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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF KANSAS, *ET AL.*, PETITIONERS

v.

UNITED STATES OF AMERICA, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Wright Amendment contravenes the Port Preference Clause.

2. Whether the Wright Amendment impermissibly abridges freedom of speech.

3. Whether the Wright Amendment impermissibly abridges fundamental rights of interstate travel.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The petitioners are the State of Kansas, the Wichita Airport Authority (an instrumentality of the State of Kansas which owns and operates the Wichita Mid-Continent Airport), Central College, Inc. (which owns and operates a travel agency),[1] and nine individual air travelers, *viz.* Debbie Cannaday, Bebe Daniels, Bernie Dworkin, A. John Hennessey, Jr., Mary Ann Lawing, Dorothy Lehman, Clifford J. Prescott, Charles W. Singleton, and Spencer Tepe.

The respondents are the United States of America, Federico Peña (as Secretary of the United States Department of Transportation), the United States Department of Transportation, John V. Coleman (as Director of the Office of Aviation Analysis), the Office of Aviation Analysis, the Dallas/Fort Worth International Airport Board, and American Airlines, Inc.[2]

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[1] Central College, Inc., has neither a parent company, nor any subsidiary not wholly owned by Central College, Inc.

[2] Petitioners' knowledge of the nature and extent of the corporate affiliations of Respondent, American Airlines, Inc. ("American"), is derived from the disclosure statement filed by American in the court of appeals. American's disclosure statement recited that American is a wholly-owned subsidiary of AMR Corporation, a publicly-traded company, and that neither AMR Corporation, nor American, has other subsidiaries or affiliates that have issued shares or debt securities to the public.

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STATE OF KANSAS, *ET AL.*, PETITIONERS,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The State of Kansas, *et al.* ("Petitioners"), petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at ____ U.S.App.D.C. ____; 16 F.3d 436. The opinion of the district court (App., *infra*, 17a-39a) is reported at 797 F.Supp. 1042.

JURISDICTION

The judgment of the court of appeals was entered February 18, 1994. (No petition for rehearing was filed in the court of appeals.) On April 15, 1994, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari through and including June 18, 1994. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the International Air Transportation Competition Act of 1979, Pub.L. No. 96-192, 94 Stat. 35 (1980), are reproduced at App. E, *infra*, 41a-42a.

STATEMENT

1. Section 29 of the International Air Transportation Competition Act of 1979, Pub.L. No. 96-192, 94 Stat. 35 (1980) (hereinafter the "Wright Amendment") is a

> ". . . provision of a distinctly parochial, domestic nature . . . designed to except Love Field [Airport in Dallas, Texas] from the liberalized entry provisions of the Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978) . . . The reason for the exception was . . . to protect [Dallas/Fort Worth International Airport] from competition at Love Field."

Continental Air Lines, Inc. v. Department of Transportation, 269 U.S.App.D.C. 116; 843 F.2d 1444, 1446 (D.C. Cir. 1988). (Starr, J.)[1] The Wright Amendment protects Dallas/Fort Worth International Airport from competition by restricting passenger service to and from Love Field, Texas (hereinafter "Love Field") through a variety of mechanisms, each of which is intended to burden those who elect to use Love Field in the course of their interstate travels. These mechanisms may be classified as (1) actual barriers to interstate movement, (2) economic disincentives, and (3) proscriptions against speech.

The Wright Amendment restricts passenger service to and from Love Field and points which do not lie within certain enumerated states (*i.e.*, Louisiana, Arkansas, Oklahoma, New Mexico, or

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[1] In *Continental Air Lines*, the United States Court of Appeals for the District of Columbia Circuit denied petitions for review of DOT's Order 85-12-81 (hereinafter the "DOT Order"), which interprets the Wright Amendment. The DOT Order is reproduced at App. F, *infra*, 43a-63a.

Texas).[2] Thus the unrestricted service area prescribed by the Wright Amendment is defined by the interstate borders which constitute the outer perimeter of the Enumerated States. (Such interstate borders are hereinafter referred to as the "Restricted Borders".)

The Wright Amendment erects actual barriers to interstate movement by prohibiting air carriers from providing "through service" for travel between Love Field and points which lie beyond the Restricted Borders. (DOT Order, at App., *infra*, 59a.)[3] Thus, under the Wright Amendment's regime, an airline passenger who elects to originate his or her interstate travel at Love Field (or an airline passenger who elects Love Field as the destination of his or her interstate travel) may not traverse the Restricted Borders by remaining on a single aircraft. (DOT Order, at App., *infra*, 59a.) For example, a Love Field Passenger[4] bound from Chicago, Illinois to Love Field must disembark the aircraft upon which she departed Chicago at some point within the Restricted Borders other than Love Field. This requirement is met by the use of intermediate airports within the Restricted Borders (hereinafter "Intermediate Airports"). In the example of a Love Field Passenger traveling from Chicago to Love Field, the airport at Tulsa, Oklahoma might be employed as the Intermediate Airport. In such case, when the aircraft lands at the Intermediate Airport (*i.e.*, Tulsa) as required by the Wright Amendment, *all*

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[2] Louisiana, Arkansas, Oklahoma, New Mexico, and Texas may be hereinafter referred to individually or collectively as "Enumerated States". States which are not privileged to be among the Enumerated States may be hereinafter referred to individually or collectively as "Unenumerated States".

[3] The phrase, "through service" refers to the provision of transportation between an ultimate origin and an ultimate destination on a single ticket for a single sum fare. "Through service" includes both single-flight service with one or more stops, and provision of service by connection between two flights. (DOT Order, at App., *infra*, 57a.)

[4] Airline passengers who elect to originate their interstate travel at Love Field, or who elect Love Field as the destination of their interstate travel, are hereinafter referred to as "Love Field Passengers."

passengers *must* disembark; they may not re-board the same aircraft to continue their travel to Love Field. However, transportation to Love Field on that same aircraft is available without restriction to any and all other persons who desire to travel from the Intermediate Airport (here, Tulsa) to Love Field.

After they are compelled to disembark aircraft at an Intermediate Airport, Love Field Passengers are permitted to continue their interstate travels on *another* aircraft, via the "most efficient connecting flight". (DOT Order, at App., *infra*, 56a.) However, the Wright Amendment imposes heavy burdens upon those who elect to do so. The Wright Amendment compels air carriers to deny certain public accommodations (*e.g.*, baggage handling and transfer) to such Love Field Passengers. (DOT Order, at App., *infra*, 58a.) By requiring Love Field Passengers to claim and recheck their baggage at an Intermediate Airport, the Wright Amendment operates to ensure that, in many cases, the "most efficient connecting flight" is a later flight than would have been available to the Love Field Passenger, if her or his baggage had been handled in the ordinary (*i.e.*, unrestricted) manner. If, as in many cases, the plane to which a Love Field Passenger would have connected via an ordinary (*i.e.*, unrestricted) connection departs from an Intermediate Airport within the time required for claiming and rechecking baggage, the Love Field Passenger may in practice be delayed for hours before the next plane bound for the Love Field Passenger's destination leaves the Intermediate Airport. Thus, the Wright Amendment operates to impose a *de facto* detention period upon Love Field Passengers at Intermediate Airports.

The Wright Amendment prohibits air carriers from selling single tickets for restricted travel between Love Field and points beyond the Restricted Borders. (DOT Order, at App., *infra*, 57a, 59a.) Thus, Love Field Passengers must purchase a combination of tickets: one for travel between Love Field and an Intermediate Airport, and one for travel between the Intermediate Airport and

the Love Field Passenger's destination beyond the Restricted Borders.[5]

The Wright Amendment prohibits air carriers from granting through fares for travel between Love Field and any point beyond the Restricted Borders. (DOT Order, at App., *infra*, 60a.) Through fares are "usually lower" than the total fare which would be charged for "double-ticketed" service to a given destination. (DOT Order, at App., *infra*, 58a, n.8.) Thus, the Wright Amendment ensures that the cost of Wright Amendment-restricted double-ticketed travel across the Restricted Borders is higher than it would be in the absence of the Wright Amendment.

The Wright Amendment prohibits air carriers from "offer[ing] for sale transportation to or from . . . any point which is outside any [Enumerated] State." (App, *infra*, 42a.) This "ban on advertising" prohibits air carriers *and even travel agents* from "advertis[ing], promot[ing], or otherwise affirmatively solicit[ing] double-ticketing passengers." (DOT Order, at App., *infra*, 58a, 59a, 60a.) Accordingly, the Wright Amendment prohibits air carriers and travel agents from disseminating truthful, "[u]nsolicited information furnished to the public in any form . . ." which might facilitate travel between Love Field and points beyond the Restricted Borders. (DOT Order, at App., *infra*, 60a.) The Wright Amendment further prohibits the mere "*publication* of connecting flight schedules [for double-ticketed service] in airline guides, flight schedules or similar media." (DOT Order, at App., *infra*, 59a. Emphasis added.) Further, the mere act of "stat[ing] as a single amount" the total cost of service between Love Field and points beyond the Restricted Borders would constitute an attribute of through service, and is therefore prohibited by the Wright Amendment. (DOT Order, at App., *infra*, 57a and note 8.)

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[5] The sale of such a combination of tickets is referred to as "double ticketing". (DOT Order, at App., *infra*, 56a.)

2. In this case, Petitioners challenge the constitutionality of the Wright Amendment.[6] Specifically, Petitioners contend that the Wright Amendment, (1) contravenes the Port Preference Clause, (2) impermissibly regulates the content of protected commercial speech, and (3) impermissibly burdens and restrains interstate travel.

Petitioners contend, *inter alia,* that the Wright Amendment contravenes the Port Preference Clause by requiring that passenger aircraft bound from Love Field to points beyond the Restricted Borders enter a port within an Enumerated State prior to traversing the Restricted Borders, and by requiring that passenger aircraft bound from points beyond the Restricted Borders to Love Field enter a port within an Enumerated State prior to entering the port at Love Field.

Petitioners contend, *inter alia,* that the Wright Amendment's content regulation of protected speech fails to satisfy any prong of the three-part test approved by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, infra.* Alternatively, Petitioners contend that regulation of commercial speech whose purpose is to propose a commercial transaction essential to the exercise of a fundamental right (here, interstate travel) should be subjected to a level of scrutiny higher than that to which content regulation of ordinary commercial speech is subjected under *Central Hudson.*

Petitioners contend, *inter alia,* that the Wright Amendment impermissibly abridges their fundamental rights of interstate travel by burdening their exercise of such right in a manner repugnant to the Due Process Clause of the Fifth Amendment, the Privileges and Immunities Clause of Article IV, and the Assembly Clause of the First Amendment. In brief, Petitioners contend that the Wright Amendment's classification of persons at Intermediate Airports as either Love Field Passengers (who are *not* free to

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[6] The district court's jurisdiction was invoked under Title 28, U.S.C., Section 1331. Petitioners seek a declaration that the Wright Amendment is unconstitutional, and injunction against enforcement thereof.

board any flight) or non-Love Field Passengers (who *are* free to board any flight) constitutes discrimination so unjustifiable as to be violative of due process. See *Shapiro v. Thompson, infra.* Petitioners further contend that the Wright Amendment's burdens on interstate travel contravene the guarantee of free ingress and egress which is implied from the Privileges and Immunities Clause of Article IV (*see ex rel., Zobel v. Williams, infra*), and that such guarantee should be held to immunize against interference by the National Government (as well as against interference by the governments of the several states).

On April 23, 1991, Petitioners filed a motion for summary judgment in the district court. The National Government[7] and the remaining Respondents[8] each responded to Petitioners' motion for summary judgment in a timely manner, and filed cross-motions for summary judgment. On June 30, 1992, the district court granted Respondents' cross-motions for summary judgment, and issued a published memorandum opinion expressing the district court's conclusion that the Wright Amendment did not offend the Constitution. In reaching its conclusion, the district court expressly relied upon a decision by the United States Court of Appeals for the Fifth Circuit which had been issued on May 6, 1991 (*i.e.*, during the pendency of Petitioners' motion for summary judgment).[9] On July 10, 1992, Petitioners timely perfected their appeal to the court of appeals.

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[7] Respondents, United States of America, Federico Peñã (as Secretary of the United States Department of Transportation), United States Department of Transportation, John V. Coleman (as Director of the Office of Aviation Analysis), and the Office of Aviation Analysis, may be hereinafter referred to collectively as the "National Government."

[8] Respondents, Dallas/Fort Worth International Airport Board (hereinafter the "D/FW Board"), and American Airlines, Inc. (hereinafter "American"), intervened as defendants in the district court.

[9] *Cramer v. Skinner*, et al., 931 F.2d 1020, *certiorari denied*, ____ U.S. ____; 112 S.Ct. 298; (1991), *affirmed following remand, sub nom. Cramer v. Card*, 983 F.2d 232 (Table), *certiorari denied, sub nom. Cramer v. Peña*,____ U.S. ____; 113 S.Ct. 2994 (1993).

3. On February 18, 1994, the court of appeals issued its opinion in this matter. App., *infra*, 1a-15a. As reflected therein, the court of appeals considered and rejected each of Petitioners' constitutional challenges to the Wright Amendment.

REASONS FOR GRANTING THE PETITION

I. SPECIAL CONSIDERATION OF PETITIONS FOR CERTIORARI IN ORIGINAL JURISDICTION CASES

While the Framers intended that the powers of the national government be supreme, they also intended that the powers of the national government be strictly limited to those delegated within the Constitution. See U.S. Constitution, at Article VI, and Amendment X. One of the broadest grants of power to the national government is that effected by the Commerce Clause (Article 1, Section 8, Clause 3). As discussed *infra*, the Port Preference Clause (Article 1, Section 9, Clause 6), effects an express limitation on the national government's commerce power, intended to protect smaller and less powerful States from discrimination at the hands of States more powerful in the Congress.

As described in Petitioners' Statement, *supra*, the Wright Amendment effects a limited air blockade against the State of Kansas by isolating Kansas from Love Field, an airport of tremendous economic importance in the Southwestern United States. As Governor Finney testified, ". . . the Wright Amendment's isolation of the ports of Kansas, including, *inter alia*, the Port at Wichita, adversely affects the size and wealth of the economy of Kansas . . ." (See Decl. of the Hon. Joan Finney, *etc.*, filed April 23, 1991, at ¶ 10.) As nationally-renowned economist Dr. Alfred E. Kahn testified, removal of the Wright Amendment would ". . . confer substantial benefit upon the economy of Kansas and other states that lie beyond the Restricted Borders . . ." (See Decl. of Dr. Alfred E. Kahn, *etc.*, filed July 22, 1991, at ¶ 8.c.)

Notwithstanding the economic importance of this case, its greater significance derives from the fact that the Wright Amend-

ment is an affront to the fundamental principle that all of the States are co-equal under the Constitution. It was in recognition of this principle that Congress acted to admit Kansas into the Union ". . . on an equal footing with the original states in all respects whatever." See Act of Jan. 29, 1861, 12 Stat. 126.

The Framers understood that conflicts among the several States (and between one or more States and the national government) would have inherent potential to threaten the cohesiveness of the Union. The Framers sought to ensure stability by conferring original jurisdiction upon this Court to resolve such conflicts. See U.S. Constitution, at Article III, Section 2, Clause 2. Thus, it can be said that the Framers intended that this Court would always provide a forum for the just resolution of conflicts among the several States (and between one or more States and the national government).

The State of Kansas is fully cognizant that this Court's caseload is enormous, and that its resources are finite. Accordingly, out of deference to this Court, Kansas elected not to seek to invoke this Court's original jurisdiction. Now, however, this Court has become the forum of last resort to determine constitutional questions whose resolution is of great importance not only to Kansas, but to the nation as a whole. Kansas respectfully submits that this Court should afford special consideration to petitions for certiorari in cases such as the instant case which are within this Court's original jurisdiction, and which present important constitutional issues defining the relationship between the national government and the States. By affording such special consideration, this Court would advance the interests which the original jurisdictional grant of Article III was intended to serve.

II. PORT PREFERENCE CLAUSE

The Port Preference Clause provides:

> "No Preference shall be given by any Regulation of Commerce or Revenue to Ports of one State over those of an-

other: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another."

It has been forty-three years since this Court last considered the Port Preference Clause.[10] During the first three decades of this Court's silence, the lower courts were also virtually silent. See *City of Houston v. Federal Aviation Administration*, 679 F.2d 1184, 1196 (5th Cir. 1982). (Noting that "[d]ecisions interpreting the [Port Preference] [C]lause are . . . few and far between . . .") During the past decade, however, there has been a relative explosion of Port Preference Clause litigation in the lower courts. See *e.g., City of Houston*; see also *City of Milwaukee*, et al. v. *Block*, et al., 823 F.2d 1158 (7th Cir. 1987) and, *following remand, City of Milwaukee*, et al. *v. Yeutter*, et al., 877 F.2d 540 (7th Cir. 1989), *certiorari denied*, 493 U.S. 976 (1989); see also *State of Nevada*, et al. v. *Watkins*, 914 F.2d 1545, 1557 (9th Cir. 1990), *certiorari denied*, 499 U.S. 906 (1991).

The Port Preference Clause is comprised of two distinct sub-clauses, separated by a colon.[11] See *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, et al., 18 Howard 421, 435 (1856). ("[T]he rights of the States were secured, by the exemption of vessels from the necessity of entering or paying duties in the ports of any State other than that to which they were bound . . . *And, also*, by the provision that no preference should be given, by any regulation of commerce or revenue, to the ports of one State over those of another." [Emphasis added.]) As dis-

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[10] Petitioners' research has revealed only one reference by this Court to the Port Preference Clause after its October Term, 1850. See *United States v. Ptasynski*, et al., 462 U.S. 74, 80 n.10 (1983).

[11] Petitioners shall hereinafter refer to the first sub-clause (*i.e.*, "No Preference shall be given by any Regulation of Commerce or Revenue to Ports of one State over those of another . . .") as the Preferential Regulation Sub-clause; Petitioners shall hereinafter refer to the second sub-clause (*i.e.*, ". . . nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another") as the Enter or Clear Sub-clause.

cussed *infra*, Petitioners contend that the Wright Amendment contravenes both sub-clauses of the Port Preference Clause.

A. Preferential Regulation Sub-clause

Decisions rendered by this Court in cases in which it was argued that a regulation of commerce impermissibly preferred the ports of one state over those of another (*i.e.*, cases implicating the Preferential Regulation Sub-clause) establish the general rule that, in order to contravene the Preferential Regulation Sub-clause of the Port Preference Clause, a regulation of commerce must effect

> ". . . a direct privilege or preference of the ports of any particular State over those of another . . . [Thus, the Port Preference Clause forbids] not discrimination between individual ports within the same or different States, but discrimination between States . . ."

State of Pennsylvania v. Wheeling, supra, at 435. See also *Alabama Great Southern R.R. v. United States*, 340 U.S. 216, 229 (1951), quoting *Louisiana Public Service Commission*, et al. v. *Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931). (The Port Preference Clause "prevent[s] preference as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports.") This Court has held that the Port Preference Clause does not prohibit acts of Congress which provide a special advantage to the port or ports of one state (*e.g.*, acts authorizing, "improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce"), where such acts "*incidentally* operate to the prejudice of the ports in a neighboring State." *State of Pennsylvania v. Wheeling, supra*, at 433. (Emphasis added.) See also *State of South Carolina v. State of Georgia*, et al., 3 Otto 4, 12-13 (1876). (An act of Congress providing for the improvement of the harbor at Savannah, Georgia by the diversion of water from the northern branch to the southern branch of the Savannah River did not offend the provision, "that no preference shall be given by any

regulation of commerce or revenue to the ports of one State over those of another." [*I.e.*, the Preferential Regulation Sub-clause.])

Facially neutral acts of Congress which have disparate effects upon the ports of different states based upon the realities of geography do not offend the Port Preference Clause. See *Armour Packing Company v. United States*, 209 U.S. 56, 80 (1908). (Holding that an act of Congress which confers an advantage upon barge shipping as opposed to rail shipping does not impermissibly prefer states whose ports have the "natural advantage" of being accessible by inland navigation over those states whose ports are not accessible by inland navigation.)

In rejecting Petitioners' argument that the Wright Amendment offends the Preferential Regulation Sub-clause, the court of appeals reasoned:

> ". . . we cannot quite conclude . . . that the words [of the Preferential Regulation Sub-clause] do not literally cover this situation. Still, the Wright Amendment is clearly not designed to provide a preference to ports of one *state* over another; it was drafted to protect DFW, one Texas airport, from competition from Love Field, another Texas airport (and to [*sic*] airline carriers who fly into DFW from competition from Southwest Airlines). Such a preference is of no concern to the Port Preference Clause which is designed to protect states, not individual ports. [Citation omitted.] . . .
>
> ". . . we cannot say there is *no* benefit afforded those airports [located in the Enumerated States] . . . The preference, such as it is, however, is rather insignificant — certainly as compared to the very substantial and undeniably legal preference bestowed on DFW as against Love Field. . . . [T]he Wright Amendment speaks directly to a port preference, but it is certainly true that Congress' obvious purpose and the primary impact of the Amendment is to favor DFW over Love Field, not to favor airports in the [Enumerated States] over those in the [Unenumerated

> States]. Under these circumstances, we do not believe the Port Preference Clause is offended."

App., *infra*, 8a-9a. There are at least two fundamental flaws in the reasoning of the court of appeals. First, the court of appeals assumes that Congress' *purpose* in enacting the Wright Amendment is relevant. Petitioners strongly disagree. As this Court has written, the Port Preference Clause effects an express "limitation on the National Government's commerce power". *United States v. Ptasynski*, et al., 462 U.S. 74, 80 n.10 (1983). Lack of animus toward Kansas cannot confer upon Congress the power to act *ultra vires* of the Constitution. Second, the court of appeals assumes that, so long as the "primary impact" of the Wright Amendment is not discrimination between states, it does not offend the Port Preference Clause. Restated, the court of appeals has held that the Wright Amendment's lawful discrimination between ports is somehow curative of the Wright Amendment's otherwise *un*lawful discrimination in favor of the Enumerated States over the Unenumerated States.

The holding of the court of appeals is in conflict with the prior decisions of this Court. First, the Wright Amendment discriminates between *states* by establishing a direct preference for the ports of the Enumerated States over those of the Unenumerated States. Second, the Wright Amendment is not facially neutral, because the Wright Amendment expressly prefers the named, Enumerated States, over the Unenumerated States. Third, as the court of appeals appears to have recognized, the Wright Amendment's detrimental effect upon the ports of the Unenumerated States is not merely an "incidental advantage[] . . . result[ing] from the legislation of Congress upon other subjects . . ." (See App., *infra*, 9a, quoting *State of Pennsylvania v. Wheeling, supra.*) Instead, the Wright Amendment's primary mechanism is to restrict passenger air service to the Unenumerated States. Finally, as the court of appeals appears to have recognized (see App., *infra*, 9a n.4) the Wright Amendment's discrimination against the Unenumerated States is no accident of geography, but a calcu-

lated erection of the political frontiers of member states of the United States as actual barriers to interstate travel. (Thus, under the regime of the Wright Amendment, a Love Field Passenger may travel without restriction to such far-away places as El Paso, Texas and Albuquerque, New Mexico, but may not travel freely to nearby Wichita, Kansas or Kansas City, Missouri, simply because these cities lie beyond the Restricted Borders.)

Because this Court has not considered the Port Preference Clause in forty-three years, this Court has had no occasion to address the Port Preference Clause in the context of aviation. Petitioners believe the application of the Port Preference Clause in the context of aviation presents important questions of federal law which have not been, but should be, settled by this Court. Additionally, for the reasons discussed above, Petitioners submit that the court of appeals has decided the question whether the Wright Amendment is repugnant to the Preferential Regulation Sub-clause in a manner which conflicts with the decisions of this Court.

B. Enter or Clear Sub-clause

In contrast to the Preferential Regulation Sub-clause (which constitutes only a "general prohibition of preferences" in regulation of commerce or revenue), the Enter or Clear Sub-clause effects an "explicit ban" on obligations to enter or clear a port of a state other than that to which a vessel is bound. *City of Milwaukee v. Yeutter, supra,* at 546. Petitioners' research has not revealed any decision of this Court which appears to apply the Enter or Clear Sub-clause. Restated, all decisions of this Court which Petitioners have found relating to the Port Preference Clause involved alleged preferences in the regulation of commerce, and none has involved a statute or regulation which purportedly obligated vessels bound to or from one state to enter the port of another. (In fact, Petitioners' research has revealed no prior statute or regulation which has expressly purported to require a vessel to enter a port of one state, prior to entering the state of its destination.)

Petitioners believe the Wright Amendment is the first federal statute or regulation to implicate the explicit ban contained in the Enter or Clear Sub-clause. The Wright Amendment contravenes the Enter or Clear Sub-clause by requiring that passenger aircraft bound from Love Field to points beyond the Restricted Borders "enter" (*i.e.*, land at) a port within an Enumerated State, before entering a port of an Unenumerated State. For example, passenger aircraft bound from Love Field to Kansas must land at an airport within Texas (or one of the other Enumerated States) before entering Kansas. Of course, landing (*i.e.*, "entry") at an airport by passenger aircraft requires "clearance" to land, and requires payment of landing fees (*i.e.*, "duties") to the operator of the airport (which, in most cases, is an instrumentality of the state in which the airport is situated).

The court of appeals rejected Petitioners' contention that the Wright Amendment contravenes the Enter or Clear Sub-clause on two grounds. First, the court of appeals accepted as "probably correct" the National Government's argument that the terms, "enter" and "clear", as employed in the Port Preference Clause

> ". . . are technical terms that refer to imported goods . . . used in the traditional commercial sense of clearing customs."

App., *infra*, 7a. Second, the court of appeals held that, ". . . whatever the precise meaning of the terms 'enter' and 'clear,' . . . " the language of the Enter or Clear Sub-clause

> ". . . literally does not apply to the Wright Amendment because it cannot be said that a 'vessel bound to or from one state [is] obliged to enter . . . in another.' "

App., *infra*, 7a.

As to the first conclusion of the court of appeals, Petitioners would note that the Enter or Clear Sub-clause is written in the disjunctive. Thus, an otherwise impermissible requirement of entry, *or* clearance, *or* payment of duties, will contravene the Enter or Clear Sub-clause even if standing alone. Petitioners submit that

the court of appeals' restrictive reading of the Enter or Clear Subclause to include only "clearing customs" is irreconcilable with the *raison d'etre* of the Port Preference Clause which, in part, was to fuse the several States into a single nation. See *Passenger Cases*, 48 U.S. (7 How.) 283, 492; 12 L.Ed. 702 (1849) (Taney, J., dissenting). ("[*Inter alia,*] the provision that vessels bound to or from one State to another shall not be obliged to enter and clear or pay duties . . . prove[s] that [the Constitution] intended to secure the freest intercourse between the citizens of the different States.")

The second conclusion of the court of appeals (*i.e.*, that "it cannot be said that a 'vessel bound to or from one state [is] obliged to enter . . . in another' "; see App., *infra*, 7a) is apparently the product of a misunderstanding of the operation and effect of the Wright Amendment. Because the Wright Amendment isolates one airport from points beyond the Restricted Borders, its effects are not symmetrical. That is to say, the Wright Amendment operates differently upon aircraft bound *from* Love Field *to* a point beyond the Restricted Borders (*e.g.*, Kansas) than it operates upon aircraft bound *to* Love Field *from* a point beyond the Restricted Borders. The court of appeals considered only the latter alternative:

> ". . . nothing in the Amendment prevents a plane leaving a non-service area state from traveling directly to *anywhere else* in *Texas* before continuing on to Love Field. As such, the language of the second part of the Clause literally does not apply to the Wright Amendment because it cannot be said that a 'vessel bound to or from one state [is] obliged to enter . . . in another.' "

App., *infra*, 7a. When an aircraft leaves Love Field for a point in Kansas, however, that aircraft may not cross the Restricted Borders into Kansas without first entering a port of another state (*i.e.*, a state other than the destination-state of Kansas). Petitioners submit that the mere fact that the Intermediate Airport may be within the origin-state of Texas is irrelevant to the constitutional

inquiry at hand. The constitutional inquiry is whether an aircraft must first enter a port of a state other than the state which is its destination. See *State of Pennsylvania v. Wheeling, supra*, at 435. ("[T]he rights of the States were secured, by the exemption of vessels from the necessity of entering or paying duties in the ports of any State *other than that to which they were bound . . .* " [Emphasis added.]) Further, insofar as Love Field is in Northern Texas, it strains logic to assume that a restriction in contravention with the literal terms of the Port Preference Clause may somehow be cured by the mere fact that aircraft which first fly south to Austin, Houston, or San Antonio (and land there) are then free to cross the Restricted Borders into Kansas.

Petitioners believe the questions presented by this case in relation to the Enter or Clear Sub-clause would be questions of first impression in this Court. Petitioners submit that such questions are important questions of federal law which have not been, but should be, settled by this Court.

III. RESTRICTIONS UPON SPEECH

As noted above, the Wright Amendment prohibits publication by airlines and travel agents of, *inter alia*, advertisements and connecting flight schedules respecting otherwise lawful double-ticketed travel between Love Field and points beyond the Restricted Borders.

A. Level of Scrutiny

Content regulation of ordinary commercial speech must be scrutinized in accordance with this Court's decision in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). In the case at bar, Petitioners sought to have a higher level of scrutiny applied to the Wright Amendment's content regulation of protected commercial speech on the ground that such regulation applies *only* to speech which facilitates a constitutionally protected activity (*i.e.*, interstate travel across the Restricted Borders). (Petitioners view the Wright Amendment as analogous to a statute which prohibits taxi-cab

companies from advertising cab rides to the polls on election day, while allowing taxi-cab companies to advertise other services not related to facilitating voting.) In seeking application of heightened scrutiny, Petitioners relied upon *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 345 (1986), in which this Court recognized the "crucial distinction" between cases involving content regulation of ordinary commercial speech and those cases in which "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected . . ." In such cases, this Court has implicitly applied a level of scrutiny higher than that applied in cases involving ordinary commercial speech. See *Carey*, etc., et al., v. *Population Services International*, et al., 431 U.S. 678, 701 (1977) (noting that the information suppressed by the statute there at issue "related to activity with which, at least in some respects, the State could not interfere." [quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976)]). See also *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (noting that the "activity advertised pertained to constitutional interests").

The court of appeals declined to apply heightened scrutiny in the instant case, reasoning that, because (in the court of appeals' view) the Wright Amendment's restrictions on interstate movement were not unconstitutional, "the advertising restrictions do not impinge on a constitutionally protected activity." App., *infra*, 13a n.6. Petitioners submit that the question whether the Wright Amendment's restrictions upon interstate movement are constitutional is wholly distinct from the question whether the Wright Amendment's content regulation of protected commercial speech should be subjected to heightened scrutiny. (See *Carey*, *supra*, analyzing restrictions upon distribution of contraceptives separately from proscription against advertisement of contraceptives.)

Petitioners have found no opinion of this Court which expressly prescribes the level of scrutiny to be applied to a federal law regulating the content of commercial speech relating to a constitutionally protected activity. If *Bigelow* and *Carey* control, the

court of appeals has decided a federal question in a manner which conflicts with applicable decisions of this Court; if *Bigelow* and *Carey* do not control, this case presents an important question of federal law which has not been, but should be, settled by this Court.

B. The Court of Appeals Erred in its Application of the Central Hudson Criteria

This Court has held that the content of ordinary commercial speech

> "may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest."

Posadas, supra, at 340, citing *Central Hudson, supra,* at 566. Assuming, *arguendo,* the *Central Hudson* inquiry is applicable to the Wright Amendment's content regulation of protected commercial speech, the court of appeals failed to conduct such inquiry in a manner consistent with the holdings of this Court.

1. Substantial Interest Criterion

The court of appeals found the substantial interest inquiry "perplexing", observing that this Court's prior decisions offer "little insight as to what criteria [this] Court used to reach its conclusion[s]." App., *infra,* 14a. The court of appeals characterized the government's interest as "ensuring adequate facilities for interstate air travel", and concluded that the substantiality of such interest was "impossible to question". App., *infra,* 15a.

This Court has held that the substantial interest inquiry "involves an assessment of the strength of the government's interest *in restricting the speech.*" *Posadas, supra,* at 341. (Emphasis added.) Of course, it is the proponent of the challenged content regulation (*i.e.,* the National Government) which must carry the ". . . *heavy burden* of justifying a categorical prohibition against the dissemination of accurate factual information to the public."

Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91, 109 (1990). (Emphasis added.)

In the case at bar, the National Government proffered no evidence which might justify the Wright Amendment's content regulation of speech. The court of appeals responded to this absence of evidence by simply identifying the government's asserted interest in the Wright Amendment as a whole, and refusing to consider whether the government ever had any identifiable interest in regulating the content of speech. See App., *infra*, 15a.

Notably, the court of appeals assumed, *sub silentio*, that if the National Government had had a substantial interest in restricting speech at the time the Wright Amendment was enacted, the substantial interest criterion would be established *in perpetuity*. This assumption seems particularly inappropriate in the case at bar, because the National Government recently issued a report to Congress (hereinafter the "Secret Report")[12] in which it admitted:

> "A change to the Wright Amendment will result in more service, more competition, lower fares, and more traffic for the Dallas-Fort Worth Metroplex and the region. *Travellers to or from the Metroplex region will save an estimated $183 million per year in air fares.* . . . Under all possible scenarios, Dallas-Fort Worth Airport will continue to grow and remain the region's dominant airport."

(Emphasis added.) Petitioners submit that the government's interest in content-regulation of speech should be measured, not at the time the regulation is enacted, but at the time the regulation is challenged. By analogy, a war-time statute prescribing internment of persons of enemy alien ancestry might well be nec-

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[12] The National Government refused to produce the Secret Report during discovery, vigorously asserting executive privilege until the very day the district court entered judgment. As soon as Petitioners perfected their appeal to the court of appeals, the National Government's asserted need for secrecy evaporated, and the Secret Report was released to Congress and the public. Petitioners requested that the court of appeals take judicial notice of the Secret Report, which it refused to do. See App., *infra*, 16a.

essary to advance the compelling governmental interest of national security at the time of its enactment; however no-one would suggest that such a statute could remain enforceable after the cessation of hostilities (*i.e.*, after the compelling interest has terminated). Similarly, where an assertedly substantial interest in regulating the content of speech has admittedly terminated, the content-regulation should not be permitted to continue *in perpetuity*.

Petitioners would note that — although the government's assertedly substantial interest in regulating the content of speech through the Wright Amendment has admittedly terminated — concerted efforts by Kansas to repeal the Wright Amendment in each of the last three Congresses have been unsuccessful. Petitioners believe the Wright Amendment's content regulation of speech actually operates as an anti-repeal clause by keeping members of the travelling public (*i.e.*, voters) ignorant of the $183,000,000.00 annual cost which the Wright Amendment imposes upon them; this, in turn, insulates members of Congress from public pressure for repeal. Petitioners are confident the airlines who actually receive the $183,000,000.00 per year in artificially inflated air fares have no difficulty in assessing their own economic interests in the Wright Amendment and ensuring that their preferences are known in Congress.

Petitioners submit that, in failing to require the National Government to establish an extant, substantial interest in regulating the content of speech, the court of appeals has decided a federal question in a way that conflicts with applicable decisions of this Court.

2. *Direct Advancement Criterion*

The court of appeals found the direct advancement criterion "rather obviously satisfied in this case." App., *infra*, 13a. The court of appeals concluded that the Wright Amendment's content-regulation of speech "reduce[s] the demand for Love Field and thereby strengthen[s] DFW." *Ibid.* Petitioners submit that the case at bar is distinguishable from those cases in which this Court

found that content regulation of protected commercial speech directly advanced governmental interests by effecting reduction in demand. For example, it is axiomatic that reduction of demand for electricity will directly advance conservation thereof. (*Central Hudson.*) In *Posadas*, "reduction of demand" *was* the government's interest. Petitioners submit that reducing demand for lawful interstate travel between Love Field and points beyond the Restricted Borders does not directly advance any asserted interest of the National Government.

Content regulation of protected commercial speech will not satisfy the direct advancement criterion where "it provides only ineffective or remote support for the government's purpose." *Central Hudson, supra,* at 564. See, *e.g., Id.,* at 569. Petitioners submit that any strengthening of D/FW which may result from the Wright Amendment's content-regulation of speech does not constitute *direct* advancement of the government's asserted interest in "ensuring adequate facilities for interstate air travel". Further, it was the National Government which bore the "heavy burden" to establish the direct advancement criterion. *Peel, supra,* at 109. The National Government proffered no evidence in support of its contention that the Wright Amendment's content-regulation of speech directly advanced the National Government's asserted interest. To the contrary, the National Government's own Secret Report would seem to contradict any such contention.

In concluding that the Wright Amendment's content-regulation of protected commercial speech directly advances the asserted interest of the National Government, the court of appeals has decided a federal question in a manner which conflicts with the decisions of this Court in *Central Hudson* and *Posadas.*

3. *Reasonable Fit Criterion*

In *Board of Trustees of the State University of New York v. Fox,* 492 U.S. 469 (1989), this Court held that content regulation of protected commercial speech is "no more extensive than necessary" to serve the governmental interest at issue where there is a reasonable fit between the objective of the legislature which

enacted the regulation and the means employed to achieve that objective. *Board of Trustees*, at 480. A "reasonable fit" requires that the regulation at issue "employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.*, at 480.

The court of appeals found the reasonable fit criterion was also "rather obviously satisfied in this case." App., *infra*, 13a. However, the court of appeals failed to consider the availability of alternative means of advancing the National Government's asserted interest. The court of appeals also failed to consider whether the Wright Amendment's restrictions on interstate travel are sufficient in and of themselves (*i.e.*, without the speech restrictions) to advance the National Government's asserted interest.

In concluding that the Wright Amendment's content regulation of protected commercial speech satisfies the final *Central Hudson* criterion, the court of appeals has decided a federal question in a manner which conflicts with applicable decisions of this Court, including, *inter alia*, the decision rendered in *Board of Trustees*.

IV. INTERSTATE TRAVEL

This Court has long held that the right to travel interstate is constitutionally protected. See *e.g.*, *Passenger Cases*, *supra*, at 492 (1849) (Taney, J., dissenting) ("[C]itizens of the United States . . . must have the right to pass and repass through every part of it without interruption . . ."); *Crandall v. Nevada*, 6 Wallace 35, 47 (1867) ("[T]he right of passing through a State by a citizen of the United States is one guaranteed to him by the Constitution . . ."); *Paul v. Virginia*, 8 Wallace 168, 180 (1869) (". . . the citizens of each State [have] . . . the right of free ingress into other States, and egress from them . . ."); *Ward v. Maryland*, 12 Wallace 418, 430 (1871) (Article IV, § 2 ". . . secures and protects the right of a citizen of one state to pass into any other state of the Union for [any lawful] purpose . . ."); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) ("[A]mong the rights and privileges of national citizenship recognized by this Court are the right to pass freely from state to state."); *United*

States v. Guest, 383 U.S. 745, 759 n.17 (1966) ("[T]he constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private."); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) ("[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel [interstate] . . ."); *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (". . . the right of interstate travel is constitutionally protected . . ."). See also *Dunn v. Blumenstein*, 405 U.S. 330 (1972); *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Califano v. Aznavorian*, 439 U.S. 170 (1978); *Jones v. Helms*, 452 U.S. 412 (1981); *Zobel v. Williams*, 457 U.S. 55 (1982); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

This Court has declared that the right to travel interstate is "fundamental". *Attorney General of New York, supra*, at 906 n.6; see also *Jones, supra*, at 418; *United States v. Guest, supra*, at 757; *Shapiro, supra*, at 638. The right to travel interstate is "basic". *Attorney General of New York*, at 901-902 (quoting *Dunn, supra*, at 338, quoting *United States v. Guest*, at 758). The right to interstate travel is an "*unconditional* personal right." *Dunn*, at 341, quoting *Shapiro*, at 643 (Stewart, J., concurring). (Emphasis supplied by the Court in *Dunn*.) "The constitutional right of interstate travel is virtually unqualified." *Haig v. Agee*, 453 U.S. 280, 307 (1981), quoting *Califano, supra*, at 176, quoting *United States v. Guest*, at 757-758.

This Court has held that the right to travel includes both the right of ingress to and egress from the states, and the right to migrate. Decisions of this Court involving the right of ingress and egress include, *inter alia*, *Crandall, Paul, Ward, Twining, United States v. Guest*, and *Griffin, supra*. Decisions of this Court involving the right to migrate include, *inter alia*, *Shapiro, Dunn, Zobel*, and *Attorney General of New York, supra*.

This Court's decisions in the right to migrate cases have principally involved state laws which have imposed only indirect burdens upon the exercise of the right to migrate, through classification of residents according to duration of residency. *Attorney*

General of New York, supra, at 903. Where such laws have survived rational basis scrutiny, this Court has applied equal protection analysis, and has ". . . required the States to come forward with a compelling justification." *Id.,* at 904. Petitioners have found only one such case involving a federal statute. In that case, *Shapiro, supra,* this Court applied an analysis under the Fifth Amendment similar to that applied to state laws under the Equal Protection Clause, and required that the federal statute be justified by a compelling interest. *Shapiro,* at 642. See also *Id.,* at 644:

> "[a statute which] impinges upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest. This is necessarily true [when] the impinging law [is] . . . a federal regulatory clause, to be tested against the Due Process Clause of the . . . Fifth Amendment."

(Stewart, J., concurring.)

In the case at bar, Petitioners seek compelling interest scrutiny of the Wright Amendment, under *Shapiro.* The Wright Amendment classifies persons at Intermediate Airports as either Love Field Passengers or non-Love Field Passengers. Outbound Love Field Passengers are not permitted to board certain flights which shall traverse the Restricted Borders, while all others are free to board such flights. Inbound Love Field Passengers are not permitted to board certain flights bound for Love Field solely by reason of their having recently traversed the Restricted Borders, while all others are free to board such flights.

In determining that the Wright Amendment does not impermissibly abridge interstate travel rights, the court of appeals failed to require the National Government to come forward with a compelling justification for the Wright Amendment. The court of appeals relied upon the observations of Justice O'Connor in her dissent in *Attorney General of New York,* in which

> "the plurality 'implicitly recognize[d] . . . [that] something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied.' 476 U.S. at 921. We think in this case that appellants' claim does not reach that threshold, and the impact of the Wright Amendment on interstate travel — even air travel to and from the Dallas-Fort Worth area — is negligible.
>
> ". . . The only relevant question is whether the Wright Amendment can be thought to deter interstate air travel to or from Dallas merely because Love Field is somewhat closer to Dallas than is DFW. . . . In short, we think the Amendment's interference with interstate travel to and from Texas or, to and from the Dallas-Fort Worth area, or even air travel to or from Dallas alone is trivial."

App., *infra*, 11a-12a. Petitioners believe the court of appeals erred in assuming that Justice O'Connor's observations in *Attorney General of New York* would be applicable in a case such as the instant case, in which a direct burden is imposed upon the right of ingress to and egress from the states. As the court of appeals noted, the federal courts have seldom encountered either federal or state laws which directly burden the right of ingress to and egress from the states. App., *infra*, 10a.

Petitioners believe the court of appeals also erred in analyzing the burden imposed by the Wright Amendment upon interstate travel as a whole, rather than considering the impact of the Wright Amendment upon Love Field Passengers at Intermediate Airports who are denied access to flights accessible to all others. It is this restriction upon the movements of *people* (as opposed to aircraft) which Petitioners believe makes the Wright Amendment unique.

Petitioners have found no opinion of this Court which expressly prescribes the level of scrutiny to be applied to a federal law which burdens the right of ingress and egress. If *Shapiro* controls, the court of appeals has decided a federal question in a manner which conflicts with applicable decisions of this Court; if *Shapiro*

does not control, this case presents an important question of federal law which has not been, but should be, settled by this Court.[13]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 1994

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[13] This case may also raise the question whether the implied right of ingress and egress derived from the Privileges and Immunities Clause of Article IV (see *Zobel, supra*, at 80 [O'Connor, J., concurring]) provides immunity against interference by the National Government.

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-5259

STATE OF KANSAS, *et al.*,
Appellants

v.

UNITED STATES OF AMERICA, *et al.*

Argued November 23, 1993

Decided February 18, 1994

Before: EDWARDS and SILBERMAN, *Circuit Judges,* and JAMES L. OAKES,* *Senior Circuit Judge,* United States Court of Appeals for the Second Circuit.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge:* Appellants, who have brought a three-pronged constitutional challenge to the Wright Amendment, claiming that it violates the Port Preference Clause and the First Amendment, and interferes with their right to interstate travel, appeal the Dis-

trict Court's grant of Summary Judgment on behalf of the government. We affirm.

I.

The Wright Amendment, section 29 of the International Air Transportation Competition Act of 1979 (the International Competition Act), Pub.L. No. 96-192, 94 Stat. 35, 48-49 (1980),[1] restricts air traffic from Love Field, an airport located

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1988).

[1] The Amendment, which is not published in the U.S. Code, reads as follows:

SEC. 29. (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign

in the Dallas-Fort Worth area. Congress enacted the Amendment because it hoped to support "a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years." H.R. CONF. REP. NO. 716, 96th Cong., 1st Sess. 24 (1979).

Prior to the enactment of the Amendment, the cities of Dallas and Fort Worth had constructed a new airport, Dallas-Fort Worth International Airport (DFW), which would handle all the area's air traffic. The cities agreed that existing airports, such as Love Field, which is about 5 miles from Dallas, would have their traffic rerouted to DFW (which is approximately 17 miles from Dallas—both distances measured as the crow flies from downtown). Though most airlines subsequently relocated to DFW, Southwest Airlines refused to leave Love Field and obtained a court ruling allowing it to continue to serve other cities in Texas. *City of Dallas v. Southwest Airlines Co.*, 371 F.Supp. 1015, 1035 (N.D.Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674 (1974). After the passage of the Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978), the Civil Aeronautics Board (CAB), as part of its airline deregulation policy, permitted Southwest to initiate Dallas-New Orleans service. *See Cramer v. Skinner*, 931 F.2d 1020, 1023 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 298, 116 L.Ed.2d 242 (1991). Congress feared that if Southwest were to operate on an unrestricted basis from Love Field (closer to

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air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979. International Competition Act, § 29.

Dallas than DFW) many travelers to and from Dallas would choose that option rather than using DFW, thus undermining the economic viability of DFW. To protect the carriers flying into DFW and, therefore, the airport, Congress passed the Wright Amendment to limit the competitive impact of Love Field.

The Amendment forbids airlines from offering direct interstate flights from Love Field except: charter flights from Love not exceeding 10 flights per month, commuter airlines carrying less than 56 passengers, and flights to the contiguous states of Louisiana, New Mexico, Oklahoma, and Arkansas. International Competition Act § 29(a)-(c). In other words, Southwest may provide direct service between Love Field and points within Texas and the states bordering Texas (the Service Area).

Passengers may, under the Amendment, still fly between Love Field and points outside the Service Area. Rather than flying directly from Love Field to those destinations, however, passengers must first travel from Love Field to a point within the Service Area, change planes, and then continue on to their final destination. Travelers must purchase separate tickets for each leg of the trip (so-called "double-ticketing") and may not check their baggage for the entire journey. And, of course, the Wright Amendment puts no restrictions on service at DFW.

The Amendment further prohibits Southwest from "offer[ing] for sale" transportation outside the Service Area. International Competition Act § 29(c)(2). The Department of Transportation, which administers the statute, has interpreted that language as barring advertising or volunteering information regarding service between Love Field and points outside the Service Area. But if a traveler asks how he or she can fly through the Service Area to points outside, an airline may provide information regarding the double-ticketing arrangement. We have previously upheld the Department's interpretation of the Wright Amendment without reaching a First

Amendment challenge. *See Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444 (D.C. Cir. 1988).

Appellants include the State of Kansas, one of its airports, the Central Travel Agency, the Wichita Airport Authority, and a number of travelers who wish to fly into Love Field from outside the Service Area without the inconvenience of a stopover in the Service Area. The travelers assert that their travel planning is burdened by the absence of published schedules and single through fares for flights to Love Field. The District Court correctly determined that at least some of the individual appellants have standing to raise all of the challenges. *Kansas v. United States*, 797 F.Supp. 1042, 1048 (D.D.C. 1992). The State of Kansas, the main litigant, may not sue on behalf of its citizens as *parens patriae, see id.* n. 10, citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n. 16, 102 S.Ct. 3260, 3270 n. 16, 73 L.Ed.2d 995 (1982), but it has standing to sue as an employer whose employees occasionally fly to Dallas. That is not, however, because Southwest's fare structure is lower than competing airlines. Appellants do not dispute that that factor is quite independent of the Wright Amendment. It is merely because Love Field is closer to Dallas and therefore the trip presumably would take less time and cost Kansas somewhat less if its employees could use Love Field. The Central Travel Agency has standing to challenge those provisions of the Amendment that inhibit its employees from dispensing information concerning flights to and from Love Field.

A virtually identical lawsuit was brought a few years ago before the Fifth Circuit,[2] which rejected all three constitutional claims, *see Cramer v. Skinner*, 931 F.2d 1020 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 298, 116 L.Ed.2d 242 (1991), as did the district court in this case. *See* 797 F.Supp. at 1054.

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[2] That case was argued by Mr. David Gallo of San Diego, who also appeared before us as a "Special" Assistant Attorney General of the State of Kansas and as an attorney representing all other appellants.

II.

A. *The Port Preference Clause*

This provision of the Constitution has never been relied on by the Federal Judiciary to hold an act of Congress unconstitutional. The District Court, accordingly, thought the clause "almost a historical nullity." 797 F.Supp. at 1049. We would prefer to say that it simply has not yet been seriously impinged upon. The Clause has two parts, both of which appellants assert have been transgressed by the Amendment. It states that: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." U.S. CONST. art. I, § 9, cl. 6.

Appellants claim that an airport is a "port" for purposes of the Clause and that the Wright Amendment, by permitting flights between Love Field and airports in service area states, discriminates against airports in non-service area states and thereby provides a "preference" to airports in service area states. Furthermore, to require passengers from, let us say, Wichita, bound for Love Field, to disembark in Oklahoma and change planes is to require those passengers and planes to "enter" or "clear" in Oklahoma before going on to Texas. The government does not dispute appellants' contentions that the Port Preference Clause covers airports and planes, so for purposes of the case, we assume that airports are "ports" and that airplanes are "vessels" within the meaning of the Clause.

The Port Preference Clause, as reflected in the records of the Philadelphia Convention, was designed to prevent the federal government from providing any regulatory benefits to ports in one state over another. The paradigm evil the Clause was explicitly designed to prevent is a federal law requiring ships sailing to Baltimore to first enter and clear at Norfolk. 2 RECORDS OF THE FEDERAL CONVENTION 417 (Max Farrand ed. 1966) (comments of Maryland delegates Daniel Carroll and Luther Martin). The Framers obviously assumed

that forcing entry or clearance in Norfolk would be a kind of tax imposed on vessels bound for the Chesapeake Bay; vessels would thereby have an incentive to reduce total expenses by delivering their cargo at Norfolk, thus reducing the volume of shipping traffic to ports in the Chesapeake.

Taking the second part of the Clause first, we consider appellants' argument that the Wright Amendment obliges planes from states outside the Service Area to "enter" or "clear" in service area states. The Government contends that the words enter and clear are technical terms that refer to imported goods. Thus, one meaning of enter is "to make report of (a ship or her cargo) at the customhouse." WEBSTER'S THIRD NEW INT'L DICTIONARY at 756. *See also United States v. Sullivan,* 26 F.2d 606, 608 (5th Cir. 1928) ("A vessel does not make entry by arriving at a port."). And "clear" refers to "free[ing] (a ship or shipment) for passage by payment of custom duties or harbor fees." WEBSTER'S at 420; *see also Harrison v. Vose,* 50 U.S. (9 How.) 372, 380-81, 13 L.Ed. 179 (1850) ("a clearance cannot be produced unless the vessel has first entered at the custom-house"). We think the government is probably correct; the terms appear to have been used in the traditional commercial sense of clearing customs. Certainly that reading fits the purpose for which the Clause was designed.

In any event, whatever the precise meaning of the terms "enter" and "clear," we do not see how the Clause applies to the Wright Amendment because it cannot possibly be said that planes "bound" for Texas are obliged to enter an airport in "another" state when they take off from outside the Service Area. That is so because nothing in the Amendment prevents a plane leaving a non-service area state from traveling directly to *anywhere else* in *Texas* before continuing on to Love Field. As such, the language of the second part of the Clause literally does not apply to the Wright Amendment because it cannot be said that a "vessel bound to or from one state [is] obliged to enter . . . in another."

Returning now to the Clause's first sub-clause, "[n]o preference shall be given by any regulation of Commerce or Revenue to ports of one state over those of another," we cannot quite conclude, as we did regarding the second part, that the words do not literally cover this situation. Still, the Wright Amendment is clearly not designed to provide a preference to ports of one *state* over another; it was drafted to protect DFW, one Texas airport, from competition from Love Field, another Texas airport (and to airline carriers who fly into DFW from competition from Southwest Airlines). Such a preference is of no concern to the Port Preference Clause which is designed to protect states, not individual ports. *See Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435, 15 L.Ed. 435 (1856).[3] Appellants argue, however, that airports in the service area states benefit because those airports can afford passengers the option of flying into Love Field directly while that advantage is not available to airports in states outside the Service Area and therefore the former are given a preference.

That advantage is of moment largely because of Southwest's lower fares, a factor quite independent of the Wright Amendment. Nevertheless, for travelers bound to Dallas, Love Field is somewhat closer than DFW, so we cannot say there is *no* benefit afforded those airports that can offer direct service to and from Love Field. The preference, such as it is, however, is rather insignificant—certainly as compared to the very substantial and undeniably legal preference bestowed on DFW as against Love Field. The Supreme Court, long ago, recog-

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[3] Luther Martin of Maryland did suggest, as another example of unconstitutional regulation, a requirement that all ships bound to Maryland enter Georgetown (rather than Chesapeake Bay Ports) but that would be, in truth, another device to favor Norfolk, Virginia because such ships would have to sail all the way up the Potomac to reach Georgetown. *See* Luther Martin, *The Genuine Information, in* 2 THE COMPLETE ANTI-FEDERALIST 63-64 (Herbert L. Storing ed. 1981).

nized that the Clause does not bar "incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce, and confessedly within its powers." *Wheeling*, 59 U.S. at 439. *See Alabama Great Southern Ry. v. United States*, 340 U.S. 216, 229, 71 S.Ct. 264, 272, 95 L.Ed. 225 (1951), quoting *Louisiana Public Service Comm'n v. Texas & New Orleans R.R.*, 284 U.S. 125, 131, 52 S.Ct. 74, 76, 76 L.Ed. 201 (1931) (Congress may enact laws which " 'greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring states' "). To be sure, in this case the legislation does not involve "other subjects"; the Wright Amendment speaks directly to a port preference, but it is certainly true that Congress' obvious purpose and the primary impact of the Amendment is to favor DFW over Love Field, not to favor airports in the Service Area over those in the non-Service Area. Under these circumstances, we do not believe the Port Preference Clause is offended.[4]

B. *The Right to Interstate Travel*

That Americans enjoy a constitutional right to interstate travel was first recognized in *Crandall v. State of Nevada*, 73 U.S. (6 Wall.) 35, 18 L.Ed. 745 (1867). Nevada had imposed a tax on stagecoaches and railroads of $1.00 for all passengers transported out of Nevada—in effect treating the whole state as a toll road for through traffic. The majority of the Supreme Court, believing the tax not violative of the dormant commerce clause under existing precedent (two dissenters believed it

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[4] The Fifth Circuit also reasoned that any preference afforded ports in the service area states was "an accident of geography." That logic was drawn from an earlier Fifth Circuit case, *City of Houston v. FAA*, 679 F.2d 1184, 1197 (5th Cir. 1982), dealing with restrictions on the total mileage flown by planes using National Airport in Washington, D.C. We are doubtful that the logic applies to this issue because all state boundaries can be termed an "accident of geography."

was), thought the right of American citizens to travel interstate—for example, to petition their government in Washington—was inherent in our union. The court, relying on a prior dissenting opinion of Chief Justice Taney in *The Passenger Cases*, 48 U.S. (7 How.) 283, 492, 12 L.Ed. 702 (1849), observed that Americans had a right to travel. Once the court determined that the right existed, Nevada's tax, by analogy to *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L.Ed. 579 (1819) (the power to tax involves the power to destroy), was held unconstitutional. The Court observed:

> [I]t may be said that a tax of One Dollar for passing through the State of Nevada, by stage coach or by railroad, cannot sensibly affect any function of the government, or deprive a citizen of any valuable right. But if the State can tax a railroad passenger One Dollar, it can tax him One Thousand Dollars. If one State can do this, so can every other State. And thus one or more States . . . may totally prevent or seriously burden all transportation of passengers. . . .

73 U.S. at 46. The federal courts have seldom again encountered either federal or state laws which directly burden interstate travel, but the right has been relied upon in recent years to condemn state laws that prefer long-time residents or penalize new residents thus indirectly implicating the right to travel. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (deprivation of voting rights); *Shapiro v. Thompson*, 24 394 U.S. 618, 629-31, 641-42, 89 S.Ct. 1322, 1328-30, 1335, 22 L.Ed.2d 600 (1969) (state imposed one year waiting period for new residents seeking welfare is unconstitutional, even with congressional authorization). When dealing with residency requirements, the Court has asked whether legislation involves a "classification which serves to penalize the exercise of that right." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903, 106 S.Ct. 2317, 2321, 90 L.Ed.2d 899 (1986) (plurality opinion) (internal quotation omitted).

This case does not involve such a classification. If the right to travel is implicated, it can only be because "impeding travel is its primary objective" or "it actually deters . . . travel." *Id.* at 903, 106 S.Ct. at 2321. The first proposition is easily rejected. The Wright Amendment is hardly *designed* to impede interstate travel; the whole purpose of the Amendment was to encourage interstate air travel to and from the Dallas-Fort Worth area, by channelling it through the newly built DFW airport. *See Cramer,* 931 F.2d at 1031. If the airport faced unrestricted competition from Love Field, it was thought such competition would undermine DFW's economic vitality and decrease total travel to and from the Dallas region.

There remains the question, does the Amendment actually deter interstate travel? We suppose that all forms of economic regulation or taxation that are imposed on modes of interstate travel, whether airlines, railroads, or buses, including even gasoline taxes can be thought—at least in pure economic terms—to raise the cost and therefore deter interstate travel. Most of such burdens are placed on travel generally whether intrastate or interstate, but some are particularized to interstate travel. For instance, many toll roads, such as the Delaware Memorial Bridge, are designed primarily for interstate use. But, as Justice O'Connor observed in her dissenting opinion in *Soto-Lopez,* the plurality "implicitly recognize[d] . . . [that] something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied." 476 U.S. at 921, 106 S.Ct. at 2330-31. We think in this case that appellants' claim does not reach that threshold, and the impact of the Wright Amendment on interstate travel—even air travel to and from the Dallas-Fort Worth area—is negligible.

The parties with the greatest economic interest in encouraging interstate air travel are, of course, the airline carriers. None have joined appellants, and one of the largest carriers, American Airlines, intervened on the government's side. Admittedly, the larger carriers may well be motivated primarily

to restrict Southwest's competition because of its lower price structure, but, as we have already observed, Southwest's lower fares are not to be attributed to the Wright Amendment. For that same reason, we must ignore the potential availability of lower Southwest fares for travelers who might wish to fly from Dallas to points outside the Service Area. The only relevant question is whether the Wright Amendment can be thought to deter interstate air travel to or from Dallas merely because Love Field is somewhat closer to Dallas than is DFW. We suppose that, at least theoretically, there exist some putative Dallas passengers who forego interstate air travel to or from points outside the Service Area because the Wright Amendment makes it burdensome to fly into Love Field and the alternative, DFW, is a longer drive, but we doubt very much if such a person could actually be found. In short, we think the Amendment's interference with interstate travel to and from Texas or, to and from the Dallas-Fort Worth area, or even air travel to or from Dallas alone is trivial.[5]

C. *First Amendment.*

The government argues initially that the First Amendment claim is not properly before us because appellants had not given the Department an opportunity to consider the issue. There is not much to this point since this case was brought initially in federal court, and it is hard to see when such an opportunity could have been afforded to the agency. Unlike *Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1455 (D.C. Cir. 1988), which involved an appeal from agency orders and where we held that the First Amendment challenge should have been raised below, there are no administrative remedies to exhaust in this case.

As lawful "speech which does no more than propose a commercial transaction," *Bolger v. Youngs Drug Products Corp.*,

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[5] The case is no different than if Love Field had been reserved entirely for intrastate carriage.

463 U.S. 60, 66, 103 S.Ct. 2875, 2880, 77 L.Ed.2d 469 (1983) (quotations omitted), so-called commercial speech, advertising of fares and service "may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest." *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980)).[6] The last two requirements are rather obviously satisfied in this case. The advertising ban advances the asserted governmental interest—to settle a regional dispute by preferring DFW over Love Field—only too well in appellants' eyes: The restrictions reduce the demand for Love Field and thereby strengthen DFW. *Cf. Posadas,* 478 U.S. at 341, 106 S.Ct. at 2976 (upholding ban that results in "the reduction of demand for casino gambling"). And the limited restriction meets the third criterion because it bears a "reasonable fit" to the interest asserted. *Board of Trustees v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 3034, 106 L.Ed.2d 388 (1989). A permissible regulation "employs not necessarily

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[6] Appellants urge that the prohibition on advertising should be judged not on the *Central Hudson* standard for commercial speech, but with the allegedly "heightened scrutiny" reserved for prohibition of speech that promote a constitutionally protected activity, in this case interstate travel. *See Carey v. Population Servs. Int'l,* 431 U.S. 678, 701, 97 S.Ct. 2010, 2024, 52 L.Ed.2d 675 (1977); *Bigelow v. Virginia,* 421 U.S. 809, 822, 95 S.Ct. 2222, 2232, 44 L.Ed.2d 600 (1975). It is not clear how much those cases add to the *Central Hudson* standard. But, in any event, appellants' attempt to bootstrap onto a higher level of scrutiny is fruitless. Our holding above that the Amendment does not violate the right to interstate travel would not change had Congress prohibited double-ticketing altogether. We therefore need not depart from *Central Hudson* since the advertising restrictions do not impinge on a constitutionally protected activity.

the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* The Department's interpretation of the statute, while prohibiting advertising of service between Love Field and points outside the service area, permits airlines and their travel agents to provide service schedules and prices (to facilitate "double-ticketing" arrangements) to customers who specifically ask for them. The advertising ban thus is narrowly tailored to be " 'in proportion to the interest served.' " *Id.* (citation omitted).

That leaves appellants' strongest claim: The government's asserted interest is not sufficiently substantial to justify the ban on advertising. The argument is troubling not because we doubt Congress's intentions in enacting the Amendment, but because the constitutional test is so perplexing. Although the Court has from time to time declared certain asserted interests to be "substantial," *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 569, 100 S.Ct. 2343, 2353, 65 L.Ed.2d 341 (1980) ("fair and efficient" energy rates); *id.* at 568, 100 S.Ct. at 2352 ("energy conservation"); *Posadas*, 478 at 341, 106 S.Ct. at 2977 ("health, safety and welfare"); *Board of Trustees*, 492 U.S. at 475, ("promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility"), and others not to be, *see Carey v. Population Servs. Int'l*, 431 U.S. 678, 701, 97 S.Ct. 2010, 2024, 52 L.Ed.2d 675 (1977) (interest against "offensive and embarrassing" advertisements and against " 'legitimation' of illicit sexual behavior"), these decisions leave little insight as to what criteria the Court used to reach its conclusion. Indeed, the pedestrian nature of those interests affirmed as substantial calls into question whether *any* governmental interest—except those already found trivial by the Court—could fail to be substantial.

Appellants describe the governmental interest in this case as merely picking sides in an ongoing dispute between two cities and their airports—an interest too petty to warrant fed-

eral intervention in appellants' eyes, let alone restrictions that implicate the First Amendment. That expression of the government's interest is too narrow. If one instead characterizes the government's interest—as we think it should be stated—as ensuring adequate facilities for interstate air travel in the Dallas-Fort Worth area, it seems to us impossible to question its substantiality. *Cf. Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 303, 64 S.Ct. 950, 956, 88 L.Ed. 1283 (1944) (Jackson, J., concurring) (recognizing unique federal interest in regulating air travel). Appellants would have us look askance at the Wright Amendment as an undesirable interference with market forces. Whatever our personal views, we cannot so view the Amendment for purposes of constitutional analysis. We, therefore, agree with the Fifth Circuit which described the Wright Amendment as an effort to resolve "a controversy that has long hindered efforts to improve airline service for the Dallas-Fort Worth area." *Cramer v. Skinner,* 931 F.2d 1020, 1034 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 298, 116 L.Ed.2d 242 (1991).

For the foregoing reasons, we affirm the Judgment of the District Court.

So Ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-5259 September Term, 1993
ARGUED: 11/23/93
[ENDORSED] FILED MAR 01 1994

STATE OF KANSAS, *et al.*,
APPELLANTS

v.

UNITED STATES OF AMERICA, *et al.*

BEFORE: Edwards and Silberman, Circuit Judges, and James L. Oakes, Circuit Judge, United States Court of Appeals for the Second Circuit.

ORDER

Upon consideration of appellants' first and second requests for judicial notice, and of the responses thereto, it is

ORDERED that the requests are denied.

PER CURIAM

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 91-0233

STATE OF KANSAS, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

June 30, 1992

MEMORANDUM OPINION

JOHN H. PRATT, District Judge.

The case before the Court involves a constitutional challenge to a provision of the International Air Transportation Competition Act of 1979 ("International Competition Act"), P.L. 96-192, 94 Stat. 35, 48-49 (1980), that limits airline operations at Love Field, one of the Dallas-area airports. The provision, known as the Wright Amendment, restricts to Texas or its four contiguous states commercial passenger air traffic departing from or arriving at Love Field. All parties have filed Motions for

Summary Judgment. Because we find that the Wright Amendment is permissible economic regulation which does not violate either the Port Preference Clause or the First Amendment of the United States Constitution or the right to interstate travel, we grant defendants' and intervenors' Motions for Summary Judgment and deny plaintiffs'.

I. *Background*

The Wright Amendment, named for its sponsor, Jim Wright, then majority leader of the House of Representatives, was added to the International Competition Act in order to resolve a long-standing dispute between the cities of Dallas and Fort Worth, Texas over the question concerning which of these two cities, closely related geographically, would have the regional airport.[1] Love Field is located 5-6 miles from Dallas, whereas Dallas-Fort Worth International Airport ("DFW"), the newer regional airport, is approximately 18 miles from the center of Dallas.[2] The Wright Amendment, Section 29 of the International Competition Act, represents a legislative determination that DFW should be the long-haul, major airport in the area. The Wright Amendment prohibits any air carrier from offering interstate flights with aircraft carrying more than 56 people at Love Field unless (a) the service existed on November 1, 1979, or (b) the service is provided by a flight to or from a point inside Texas and the four states bordering on Texas (Louisiana,

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[1] Both cities, which are located 31 miles apart, originally had their own airports, Love Field and Meacham Field. The two cities agreed to resolve their dispute by building a new airport, DFW, and consolidating most airline service there. After DFW opened in 1974, the eight certificated airlines that had been serving the area moved their operations to DFW. Southwest Airlines declined to move. *See City of Dallas v. Southwest Airlines Co.*, 371 F.Supp. 1015, 1019-21 (N.D.Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied* 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674 (1974).

[2] The two airports are approximately 12 miles apart.

Arkansas, Oklahoma, and New Mexico) ("Love Field Service Area").[3] Airlines may not operate flights or provide through service from Love Field to a point outside the Love Field

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[3] The Wright Amendment in full provides:

SEC. 29. (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979.

Service Area, and may not allow passengers to interline on Love Field flights.[4] The Amendment states that airlines may not "offer for sale" transportation from Love Field to a point outside the Love Field Service Area. Department regulations prohibit an airline from advertising or volunteering information on service from Love Field to areas outside the Love Field Service Area, but do not prohibit an airline or travel agent from providing such information when a traveller asks for it.[5]

The Wright Amendment has been challenged before and has survived. As recently as May 9, 1991, the Fifth Circuit ruled that the Amendment did not violate the Constitution in *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir.), *cert. denied*, ___ U.S.___, 112 S.Ct. 298, 116 L.Ed.2d 242 (1991).[6] Addi-

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[4] Interline service is connecting service involving a change from one airline to another where each carrier agrees to accept tickets written for travel on it by another carrier and where the carriers provide for the transfer of baggage between flights. CAB Order 80-8-181 at 4 (Aug. 29, 1980). Through service means service provided between the ultimate origin and destination on a single ticket for a single sum fare. It also includes provision of service by connection between two flights. Love Field Amendment proceeding, Dept. of Trans. Order 85-12-81 at 10 (Dec. 31, 1985), Defendants' Motion for Summary Judgment Ex. B.

[5] The carrier may not display in a computer reservations system or list in its flight schedules, service from Love Field to a point beyond the Love Field Service Area. However, if customers are aware that such service is available, they can ask for it and be sold a double-ticketed service. "[I]t does not appear that Congress intended to preclude entirely the use of Love Field by passengers who take the effort to find out that double-ticketed service is available, who demand such tickets, and who accept the inconvenience of that service." Love Field Amendment Proceeding, Dept. of Trans. Order 85-12-81 at 12 (Dec. 31, 1985), Defendants' Motion for Summary Judgment Ex. B.

[6] The Southern District of California has also dismissed a challenge to the Amendment on the ground that plaintiff lacked standing. *See Zamutt v. Skinner*, No. 90-0602-B(M), 1990 WL 430756 (S.D.Cal. Dec. 6, 1990).

tionally, this Circuit has previously upheld the validity of the Department of Transportation ("DOT") Order that implements the Amendment.[7] *See Continental Air Lines, Inc. v. Department of Transportation,* 843 F.2d 1444 (D.C. Cir. 1988).

II. *Standing To Sue*

Before reaching the merits, we consider defendants' argument that plaintiffs lack standing. Plaintiffs in this action include the State of Kansas; the Wichita Airport Authority; Central College, Inc. (a travel agency); and nine individuals.[8] Defendants include the United States of America; Samuel Skinner; the United States DOT; John V. Coleman and the Office of Aviation Analysis. Additionally, Dallas-Fort Worth International Airport Board and American Airlines, Inc. have been permitted to intervene.

When a court considers the issue of standing on a motion for summary judgment, the plaintiff must submit affidavits that indicate that a genuine issue of fact exists on this issue. *See Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 110 S.Ct. 3177, 3184, 111 L.Ed.2d 695 (1990). A party who invokes the court's authority must show that the party " 'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (*quoting Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979)). The injury must be traceable to the

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[7] The Circuit did not reach the merits of the claim that the restrictions on Love Field advertising violated the First Amendment's protection of commercial speech as the court held that the airline had not exhausted its administrative remedies. *See* 843 F.2d at 1445.

[8] Debbie Cannaday, Bebe Daniels, Bernie Dworkin, A. John Hennessey, Jr., Mary Ann Lawing, Dorothy Lehman, Clifford Prescott, Charles Singleton, and Spencer Tepe.

challenged action and must be remediable by a favorable decision. *Id.* 454 U.S. at 472, 102 S.Ct. at 758. For the purposes of determining standing, we must assume the challenged conduct is unconstitutional or otherwise contrary to law. *See Warth v. Seldin,* 422 U.S. 490, 502, 95 S.Ct. 2197, 2207, 45 L.Ed.2d 343 (1975); *Cramer v. Skinner,* 931 F.2d 1020, 1025 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 298, 116 L.Ed.2d 242 (1991).

Defendants challenge the standing of ten of the twelve plaintiffs to bring this case, but do not question the standing of the remaining two, Bebe Daniels and Bernie Dworkin. If either of these plaintiffs has standing to bring this case, even if all ten of the other plaintiffs lack standing, this Court still has jurisdiction to "entertain those common issues presented by all plaintiffs." *General Building Contractors Association, Inc. v. Pennsylvania,* 458 U.S. 375, 402 n. 22, 102 S.Ct. 3141, 3156 n. 22, 73 L.Ed.2d 835 (1982). *See also Watt v. Energy Action Educational Foundation,* 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981); *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264 n. 9, 97 S.Ct. 555, 562 n. 9, 50 L.Ed.2d 450 (1977). Accordingly, we now turn to whether or not Daniels and Dworkin have asserted an injury sufficient to support standing.

Both Daniels and Dworkin have asserted three discrete injuries: 1) the deprivation of their First Amendment right to hear; 2) the deprivation of their fundamental right to travel; and 3) economic injury. Plaintiffs can establish standing if they can show a "substantial probability" that even one of their asserted injuries will be redressed by a favorable ruling. *See Larson v. Valente,* 456 U.S. 228, 243 n. 15, 102 S.Ct. 1673, 1682 n. 15, 72 L.Ed.2d 33 (1982).

Bebe Daniels is a 80-year old widow who resides in close proximity to Love Field. *See* Declaration of Bebe Daniels in Support of Plaintiffs' Motion for Summary Judgment, or in the Alternative, for Partial Summary Adjudication ("Daniels Decl.") ¶ 3. Daniels claims that on her annual visit to Chicago,

she travels via Love Field on Southwest Airlines because it is the least expensive carrier serving Dallas and Chicago. She alleges that on visits in 1989 and 1990 she was forced to disembark in Tulsa, Oklahoma, retrieve and recheck her luggage, and wait for at least 45 minutes before she could continue on her trip, because of the limitations imposed by the Wright Amendment. She further claims that on one occasion when returning from Chicago, she had to disembark the aircraft in Tulsa, even though the plane was continuing to her destination in Love Field. She states that "Southwest's employees politely informed me that they were forbidden by the Wright Amendment from allowing me to board Flight 43, because I had just arrived on a flight (*i.e.*, Flight 953) which had crossed the Restricted Borders." Daniels Decl. ¶ 17. Consequently, she had to await the next flight to Love Field, which left one hour and five minutes later. Daniels Decl. ¶ 19.

Bernie Dworkin, a resident of Dallas who is a frequent traveler outside of the Love Field Service Area, alleges that he believes Southwest provides the most inexpensive fares and that because of the Wright Amendment he is forced to either pay more to use a carrier that operates out of DFW or face "detention" at an intermediate airport. Declaration of Bernie Dworkin in Support of Plaintiffs' Motion for Summary Judgment, or in the Alternative, for Partial Summary Adjudication ("Dworkin Decl.") ¶ 8.

Both Daniels and Dworkin assert that they are dependent on airline personnel, travel agents, and printed media published by airlines in planning their trips and that the publication of single-sum fares and published schedules would help their travel planning. Daniels Decl. ¶¶ 21-22; Dworkin Decl. ¶¶ 14-15.

A. First Amendment

Plaintiffs assert that the Wright Amendment regulates the content of protected commercial speech and violates the right of individuals to receive such information. *See* Complaint ¶

86. Daniels and Dworkin are limited by the Wright Amendment from learning of the availability of double ticketed service whereby they could fly from Love Field to a point outside the Love Field Service Area. They are not permitted to be told the total cost of such a trip as a single sum. The Wright Amendment also prevents the airline guide publication of connecting flight schedules, thereby preventing those passengers who know of the possibility of double ticketing from expediently planning their trip.

The abridgement of the First Amendment right to receive information is a judicially cognizable injury. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, 96 S.Ct. 1817, 1823, 48 L.Ed.2d 346 (1976). As the Fifth Circuit noted in *Cramer v. Skinner*, the plaintiffs are "affected by the Love Field amendment's restrictions whenever [they plan] a trip beyond the Love Field service area." *Cramer*, 931 F.2d at 1027. The Fifth Circuit found that this injury placed the First Amendment claim in a "concrete factual context" that was conducive to realistic judicial appraisal. *Id.* (quoting *Valley Forge Christian College*, 454 U.S. at 472, 102 S.Ct. at 758.) We agree. Daniels and Dworkin have established that at the least they are hindered in their receipt of truthful information because of restrictions imposed by the Wright Amendment. Consequently, we find, as the Fifth Circuit did, that Dworkin and Daniels have alleged a sufficient injury to assert standing to litigate the First Amendment claim.

Assuming for the purposes of this analysis that the Wright Amendment and the DOT regulations do violate the plaintiffs' First Amendment right to receive information, we now look to whether a favorable ruling would redress the injury.

Southwest has indicated that in the absence of the statute it would advertise both the availability and the cost of service between Love Field and points beyond the Love Field Service Area. *See* Supplemental Statement of Material Facts as to

Which Plaintiffs Contend There is No Genuine Issue ("Supplemental Facts") ¶ ac. Plaintiffs then would be able to comparison shop more easily, and would encounter greater flexibility in planning their travel. Thus, Dworkin's and Daniels' injuries are fairly traceable to the Wright Amendment. There is a substantial probability that a favorable decision would redress their injury.

B. Right to Interstate Travel

It has long been settled that the Constitution protects the right to travel interstate. *See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901, 106 S.Ct. 2317, 2319, 90 L.Ed.2d 899 (1986). Plaintiffs Dworkin and Daniels allege that they have suffered an injury in fact because they have been "detained" at intermediate airports as a result of the Wright Amendment's prohibition on travel from beyond the Love Field Service Area to Love Field. Their declarations allege specific trips where they were required to disembark in an intermediate airport, reclaim luggage, and wait more than 45 minutes before they were permitted to continue on their journey to Love Field, even though there was an earlier flight that they could have taken. Dworkin also alleges an injury insomuch as he was denied access to a flight open to all passengers other than those from Love Field. We find that this is a sufficient actual injury that is fairly traceable to the challenged Amendment. If not for the Wright Amendment, Dworkin and Daniels would not have had to reclaim baggage or take a connecting service flight other than the most convenient.

Further, there is reason to believe that plaintiffs' injuries would be redressed if they received a favorable decision. At the very least, plaintiffs would be allowed to check their luggage through to their final destination, and they would not be subject to any "detention" period at intermediate airports. Southwest has also indicated that it would likely institute same-

plane through service between Love Field and Chicago if the Wright Amendment were struck down.[9]

C. Economic Injury

Similarly, the economic injuries which plaintiffs Dworkin and Daniels assert, while more intangible, are sufficiently concrete to provide standing. Daniels has asserted that the Wright Amendment prohibits discounted through fares, which has caused her financial harm. Dworkin claims that because of the wait between connecting flights he chose to fly to Phoenix from DFW instead of Love Field, and therefore that he had to pay a higher fare than he would have paid for double ticketed service from Love Field. Plaintiff has offered a deposition of Herbert Kelleher, the CEO of Southwest Airlines Co., who testified that it was substantially probable that if not for the Wright Amendment, Southwest would offer through fares, baggage checking, and nonstop service between Love Field and San Diego, Los Angeles, San Francisco, Phoenix and Las Vegas. Mr. Kelleher also testified that through fares were generally lower than the sum of point to point fares. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Cross Motions for Summary Judgment ("Plaintiffs' Opposition") Ex. A. at 27-31.

We conclude that plaintiffs Daniels and Dworkin have standing because they have sufficiently shown that they have suffered injuries, that their injuries are fairly traceable to the chalienged conduct, and that there is a substantial probability that they will be redressed by a favorable outcome.[10] Accordingly, we now turn to the merits of plaintiffs' challenge.

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[9] *See* Supplemental Facts ¶ 1. The airline also indicated that it would offer non-stop, through, or connecting service between Love Field and a number of destinations. *See* Supplemental Facts ¶¶ j, n, p, r, t, x.

[10] We note too, that the State of Kansas has standing to bring this challenge in its capacity as an employer even though it cannot not

III. *Challenges to the Constitutionality of the Wright Amendment*

Plaintiffs bring several constitutional challenges to the Wright Amendment. Specifically, they allege that it violates the Port Preference Clause, the right to travel interstate, and the First Amendment. We consider each in turn.

A. Port Preference Clause

Plaintiffs contend that the Wright Amendment violates the Port Preference Clause by "establishing a direct preference for the ports of the Enumerated States over those of the Unenumerated States." Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, or In the Alternative, for Partial Summary Adjudication ("Plaintiffs' Mem.") at 18.

The Port Preference Clause provides:

> No Preference shall be given by any Regulation of Commerce or Revenue to Ports of One State over those of another: nor shall Vessels bound to, or from one State be obliged to enter, clear, or pay duties in another.

U.S. Const. art. I, § 9, cl. 6. The Clause has been interpreted only rarely over the last two hundred years, but the limited

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bring this suit against the federal government as *parens patriae, see Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 610 n. 16, 102 S.Ct. 3260, 3270 n. 16, 73 L.Ed.2d 995 (1982). It has alleged sufficient pecuniary injury as it must pay twice the double ticketed fare to Love Field to fly to DFW, or be forced to disembark the plane at an intermediate station if flying to Love Field (on government time). This injury is traceable to the Wright Amendment. Further, as Southwest has indicated that there is a substantial probability that it would initiate non-stop service between Love Field and Kansas City International Airport, Supplemental Facts at ¶ K, there is a substantial probability that injury would be redressed. Therefore, the state has asserted a judicially cognizable injury which is likely to be redressed by a favorable decision.

existing jurisprudence indicates that it operates as a narrow exception to Congress' power to regulate commerce.

Plaintiffs make an ambitious argument because we can find no case in which the Port Preference Clause has been used to strike down an act of Congress. Although the case law and legislative history offer some support for plaintiffs' argument that the Port Preference Clause prohibits precisely this type of statute—one that discriminates on the basis of states qua states—we believe that the Port Preference Clause has been rendered almost a historical nullity. As we find that the Wright Amendment was enacted incident to Congress' well-established power to regulate air transportation, and as there is no evidence that any impermissible motive led to the adoption of the four state Love Field Service Area, we hold that the Wright Amendment does not violate the Port Preference Clause of the United States Constitution. The following discussion is illuminating not only as to the history and origins of the Clause but also as to its treatment in the Courts.

The Port Preference Clause was originally enacted to calm the fears of Maryland that Virginia would use its political clout to force ships bound for Maryland to stop and clear customs at Norfolk, Virginia, before entering the Chesapeake Bay. *See City of Milwaukee v. Yeutter,* 877 F.2d 540, 545 (7th Cir.), *cert. denied,* 493 U.S. 976, 110 S.Ct. 500, 107 L.Ed.2d 503 (1989) (citing 2 The Records of the Federal Convention of 1787 at 417 (Max Farrand ed. rev. ed. 1966) ("Federal Convention Records")). Although the language adopted at the Convention was weaker than some preferred, it is well established that the goal of the clause was to prevent the national government from explicitly privileging the port and related duty collection of certain states.[11] It was originally proposed with the Unifor-

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[11] Luther Martin, the proponent of the clause, noted its importance: This provision, as well as that which relates to the uniformity of impost duties and excises, was introduced, Sir, by the delegation of this State. Without such a provision, it would have been in

mity Clause, Art. I, § 8, cl. 4., and "reported out of a special committee as an interrelated limitation on the National Government's commerce power". *United States v. Ptasynski,* 462 U.S. 74, 80 n. 10, 103 S.Ct. 2239, 2243 n. 10, 76 L.Ed.2d 427 (1983) (citing 2 Federal Convention Records at 437). *See also Knowlton v. Moore,* 178 U.S. 41, 104, 20 S.Ct. 747, 772, 44 L.Ed. 969 (1900) (two clauses had the same significance).

In the two hundred-odd years since its adoption, the Port Preference Clause has been interpreted only rarely, and then, under its most narrow construction. Indeed, we must go back to the year 1856, almost a century and a half ago, to find the leading case on the Port Preference Clause. In *Pennsylvania v. Wheeling and Belmont Bridge Co.,* 59 U.S. (18 How.) 421,

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> the power of the general government to have compelled all ships sailing into or out of the Chesapeake, to clear and enter at Norfolk, or some port in Virginia; a regulation which would be extremely injurious to our commerce, but which would, if considered merely as to the interest of the Union, perhaps not be thought unreasonable; since it would render the collection of the revenue arising from commerce more certain and less expensive.

3 Federal Convention Records App. A, CLVIII at P 67. But Martin was displeased with the final version, as it permitted the Federal government to regulate the ports indirectly. As the Seventh Circuit noted in *City of Milwaukee v. Yeutter,*

> Luther Martin, the force behind the Clause, was not satisfied and went into opposition after the Convention. Martin complained that the Clause dealt only with express preferences and left states to bear the effects of other rules. He expressed greatest concern about Congress' power to designate some places as customs ports to the exclusion of others . . . . Hyperbole from opponents must be used with care, but Martin, as the proponent of the Port Preference Clause, was in the ideal position to know what he had and hadn't obtained from his colleagues at the Convention; he wanted, and couldn't get, a ban on disparate impact. For two hundred years, courts have understood that only explicit discrimination violates the Port Preference Clause, and this dooms Milwaukee's argument.

877 F.2d at 546.

15 L.Ed. 435 (1856), Pennsylvania challenged the construction of a bridge over the Ohio River near Wheeling, West Virginia. Pennsylvania contended that the low height of the bridge discouraged river traffic from continuing up river to Pittsburgh and that Congress' explicit approval of the construction of the bridge thereby violated the Port Preference Clause. The Supreme Court found that the construction of the bridge did not violate the Port Preference Clause. The Supreme Court interpreted the clause narrowly, finding that it did not prohibit regulation that had disparate effects on various ports, but only those acts which directly discriminated against states:

> Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by Congress to this effect, and not against any incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce, and confessedly within its powers . . . The truth seems to be, that what is forbidden is, not discrimination between individual ports within the same or different states, but discrimination between states; and if so, in order to bring this case within the prohibition, it is necessary to show, not merely discrimination between Pittsburgh and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.

59 U.S. at 433-35. Later cases have supported this approach. As it has been interpreted, the Port Preference Clause does not bar statutes regulating commerce that incidentally operate to the prejudice of the ports in a neighboring state, but it forbids discrimination between states. *See, e.g., Louisiana Public Service Commission v. Texas & New Orleans R.R.,* 284 U.S. 125, 131, 52 S.Ct. 74, 76, 76 L.Ed. 201 (1931); *Armour Packing Co. v. United States,* 209 U.S. 56, 80, 28 S.Ct. 428, 435, 52 L.Ed. 681 (1908); *South Carolina v. Georgia,* 93 U.S. 4, 13, 23 L.Ed. 782 (1876). Similarly, facially neutral statutes that disparat ly affect states do not violate the clause. *See Alabama Great Southern R.R. v. United States,* 340 U.S. 216, 229, 71 S.Ct. 264, 272, 95 L.Ed. 225 (1951).

This is not the first time that the Port Preference Clause has been used in an attempt to challenge airport perimeter rules. In *City of Houston v. Federal Aviation Administration*, 679 F.2d 1184 (5th Cir. 1982), the Fifth Circuit upheld a F.A.A. regulation that prohibited the use of National Airport for non-stop flights to cities that were more than 1,000 miles from Washington, D.C. After reviewing the Port Preference Clause jurisprudence, the Fifth Circuit distilled the parameters of the Port Preference Clause as it has been interpreted by the Supreme Court:

> Government actions do not violate the Clause even if they result in some detriment to the port of a state, where they occur (i) as an incident to some otherwise legitimate government act regulating commerce or (ii) more as a result of the accident of geography than from an intentional government preference.

679 F.2d at 1197. The Fifth Circuit upheld the 1,000 mile perimeter rule for Washington National Airport, noting that the rule was facially neutral, and that it did not discriminate against any particular state. *Id.* at 1198.

In *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 298, 116 L.Ed.2d 242 (1991), the Fifth Circuit relied on the prior *City of Houston* and found that the Wright Amendment satisfied both prongs of the test. The Circuit held that the Wright Amendment was enacted incident to Congress' regulation of interstate airline service and "pursuant to its rational decision to maintain the agreement between Dallas and Fort Worth," 931 F.2d at 1032, and that the four states preferred by the Amendment were preferred as an accident of geography rather than as the result of an intentional government preference. *Id.*

> Cramer has not demonstrated that Congress deliberately discriminated against the 45 states not bordering on Texas by requiring travelers from such states to use DFW if they wish to travel to Dallas-Fort Worth on a nonstop or "through" ticket.

931 F.2d at 1032 n. 14.

The Wright Amendment was enacted pursuant to the government's power to regulate air transportation and to resolve a long-standing dispute that had impeded the development of the region's air resources. It does not require that all flights from Kansas to Texas first stop in one of the four contiguous statesт only conditions those heading to or leaving from Love Field. Nothing is stopping flights from Kansas from flying directly to DFW, only a few miles from Love Field.[12]

Finally, while the choice of the surrounding states as the Love Field Service Area rather than a straight distance perimeter rule may be a less desirable alternative, it is not unconstitutional. As other courts have noted, any perimeter rule is by its nature somewhat arbitrary.[13] There is no evidence that Congress chose these four states with any evil motive, or for any reason other than they were the closest ones. The use of political boundaries in lieu of geographical ones does not, without more, turn an otherwise permissible "accident of geography" into an impermissible use of state power. This would be elevating form over substance.

As an initial proposition, plaintiffs make a compelling argument that the Port Preference Clause, as it was enacted,

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[12] The Port Preference clause has been construed so narrowly that we think only a statute that required all planes leaving or entering Texas as to first land in one of the contiguous states would violate the Port Preference Clause. Even then the Fifth Circuit's interpretation might permit such an act if the requirement were incident to "some otherwise legitimate act regulating commerce."

[13] *See, e.g., Cramer v. Skinner,* 931 F.2d 1020, 1031 (5th Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 298, 116 L.Ed.2d 242 (1991); *City of Houston v. Federal Aviation Administration,* 679 F.2d 1184, 1193 (5th Cir. 1982); *Western Air Lines, Inc. v. Port Authority,* 658 F.Supp. 952, 958-959 (S.D.N.Y. 1986), aff'd, 817 F.2d 222 (2d Cir. 1987), *cert. denied,* 485 U.S. 1006, 108 S.Ct. 1467, 99 L.Ed.2d 697 (1988).

was designed to prevent this type of legislation. However, it has not so been interpreted by the courts of this land. In the end, we are forced to agree with Justice Holmes who said: "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner,* 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963 (1921). We hold that the Wright Amendment does not violate the Port Preference Clause of the Constitution.

B. Right to Travel Interstate

Plaintiffs also argue that the Wright Amendment violates the right to travel interstate by creating an impermissible classification based upon the exercise of a fundamental right. *See* Plaintiffs' Mem. at 29-30. We do not accept this contention. Instead, we hold that the Wright Amendment is not an unconstitutional violation of the right to interstate travel because it is a minor restriction, and furthers legitimate governmental goals.

" ' 'Freedom to travel throughout the United States has long been recognized as a basic right under theConstitution.' ' "[14] Although the textual support for this right has been located in various provisions of the Constitution,[15] "[w]hatever its origin, the right to migrate is firmly established and has been repeatedly recognized . . .". *Attorney General of New York v. Soto-Lopez,* 476 U.S. 898, 903, 106 S.Ct. 2317, 2320-21, 90 L.Ed.2d 899 (1986) (plurality opinion).

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[14] *Attorney General of New York v. Soto-Lopez,* 476 U.S. 898, 901, 106 S.Ct. 2317, 2320, 90 L.Ed.2d 899 (1986) (quoting *Dunn v. Blumstein,* 405 U.S. 330, 338, 92 S.Ct. 995, 1001, 31 L.Ed.2d 274 (1972) (quoting *United States v. Guest,* 383 U.S. 745, 758, 86 S.Ct. 1170, 1178, 16 L.Ed.2d 239 (1966)) (plurality opinion).

[15] *See* 476 U.S. at 902, 106 S.Ct. at 2320 (noting that the right has been located in the Privileges and Immunities Clause of Article IV, the Commerce Clause, the Privileges and Immunities Clause of the Fourteenth Amendment, and the federal structure of the government).

Where the fundamental right to travel is implicated, a statute can be upheld only if it is supported by a showing of compelling interest on the part of the government. *See* 476 U.S. at 904, 106 S.Ct. at 2321. However, not every restriction on travel operates to implicate the fundamental right. *See id.* at 903, 106 S.Ct. at 2321 (state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right); *Jones v. Helms,* 452 U.S. 412, 423, 101 S.Ct. 2434, 2442, 69 L.Ed.2d 118 (1981).[16] The relevant question is not only the extent of the governmental restriction involved, but also the necessity for the restriction. *See Zemel v. Rusk,* 381 U.S. 1, 14, 85 S.Ct. 1271, 1279, 14 L.Ed.2d 179 (1965).

The Wright Amendment operates only as an inconsequential impediment to the right to travel and does not implicate the fundamental right. The Wright Amendment does not prohibit interstate travel, it merely makes it slightly more of a hindrance for those travelers who insist on using Love Field. As the Fifth Circuit noted in *Cramer,* "The Love Field Amendment does not bar travelers from distant cities from using Love Field. Rather, just as the perimeter rule at issue in *City of Houston,* it makes travel less convenient for such passengers. Love Field remains attractive for many long-distance travelers, . . . despite the statutory restrictions." 931 F.2d at 1030.

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[16] *See also Attorney General of New York,* 476 U.S. at 921, 106 S.Ct. at 2330-31 (O'Connor, J., dissenting) ("As the plurality implicitly recognizes, it is fair to infer that something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied."); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 256-257, 94 S.Ct. 1076, 1081, 39 L.Ed.2d 306 (1974) ("The amount of impact required to give rise to the compelling-state interest test was not made clear."); *Cramer,* 931 F.2d at 1031 ("Minor restrictions on travel simply do not amount to the denial of a fundamental right that can be upheld only if the Government has a compelling justification").

There is no constitutional right to the most convenient form of transportation.[17] No one is prevented from travelling to any state in the Union by the Wright Amendment; they are merely restricted from using one airport to do so.[18] Nor is anybody completely prevented from using Love Field to travel beyond the Love Field Service Area: the Wright Amendment merely delays their departure for a short period. "[N]ot all waiting periods are impermissible."[19] If anyone wants to fly into Texas they can do so; if they insist on flying into Love Field, they can also do so, but with some restrictions. The Wright Amendment merely makes some travel less convenient for some residents, but it does not prevent them from exercising their right to travel interstate.[20]

Further, Congress imposed the Wright Amendment for rational reasons: to legislatively support a dispute resolution

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[17] 931 F.2d at 1031; *City of Houston v. Federal Aviation Administration*, 679 F.2d 1184, 1198 (5th Cir. 1982) ("At most, their argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel. That notion, as any experienced traveler can attest, finds no support whatsoever in *Shapiro* or in the airlines' own schedules").

[18] *Cf. Anderson v. USAir, Inc.*, 818 F.2d 49, 56 (D.C. Cir. 1987) ("But, as to the federal government, it is well established that a policy intimately related to interstate air travel would not exceed the scope of the commerce clause"; indicating that policy that prevented disabled passenger from seating in emergency rows would not violate right to travel as seats were offered in nonemergency rows).

[19] *Attorney General of New York*, 476 U.S. at 905 n. 5, 106 S.Ct. at 2322 n. 5 (discussing *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), which found that a one-year residency condition for maintaining an action for divorce did not impermissibly violate the right to migrate).

[20] Of course, a different result would be required if Love Field were the only airport in Texas. Then, a congressional enactment that limited the flights from that airport to certain states would clearly implicate the right to interstate travel.

reached by the two cities. The perimeter rule reinforced the development of DFW into the leading airport in the area, and indeed one could argue (as defendants do) that the Wright Amendment was designed to facilitate interstate travel.

Consequently, we find that the Wright Amendment does not impermissibly infringe on the right to interstate travel.[21]

C. First Amendment

Plaintiffs' final claim is that the Wright Amendment impermissibly abridges the First Amendment by limiting protected commercial speech. This claim was also asserted to support plaintiffs' assertion of their standing to sue. Commercial speech is that speech which proposes a commercial transaction. *See Board of Trustees v. Fox,* 492 U.S. 469, 473-74, 109 S.Ct. 3028, 3031, 106 L.Ed.2d 388 (1989); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986). There is no doubt that the speech at issue here, the advertising of flights

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[21] Plaintiffs also argue that the Wright Amendment infringes on the First Amendment right of association. They recall the freedom riders and the civil rights workers to claim that prohibiting travel can deter people from associating with whomever they want. They argue that if the Wright Amendment is permissible, precedent in this case could be used to support "some future congress or president to suppress dissent against some future declared or undeclared war, some future tax, or some other action of government, through the enactment of facially innocuous restraints on travel between the states." Plaintiffs' Mem. at 38. Plaintiffs argue that under First Amendment analysis, restraints on interstate travel should be considered as analogous to restraints on speech and restrictions on travel conditioned on crossing state lines should be similar to content restriction. While this is an interesting argument, we feel no need to extend the law in this direction. Plaintiffs have introduced no evidence that the Wright Amendment was enacted to curtail the associational or speech rights of any traveler, nor any evidence that it in fact does so. Consequently, we reject this approach. *See Cramer,* 931 F.2d at 1032-33.

available from Love Field, proposes a commercial transaction and is commercial speech.

To analyze the lawfulness of restrictions on commercial speech, the Supreme Court has indicated that the proper approach is first to

> 'determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.'

Board of Trustees, 492 U.S. at 475, 109 S.Ct. at 3032 (quoting *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980)). As no party has alleged that the speech at issue here does not concern lawful activity or is misleading, we will assume that the speech at issue is protected by the First Amendment.

We next turn to whether the asserted governmental interest is substantial and whether the regulation is broader than is necessary to serve that interest. The defendants assert that the government's interest was to resolve the differences between Dallas and Fort Worth in developing a regional airport. *See also* H.R. Conf. Rep. No. 716, 96th Cong., 1st Sess. 24-26 (1979) ("Perhaps the most important point about Section 29 is that it provides a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years"). This is a substantial governmental interest. It is beyond question that Congress has the power to regulate air transportation in this country, and the development of airports falls squarely within that ambit. The Wright Amendment

serves to finally resolve a dispute that had prevented the region from developing its resources.

The Wright Amendment directly advances the interest asserted by reducing demand for air travel from Love Field. Lack of advertising will lead to a lack of consumer awareness, and while it is not a particularly attractive government goal to keep consumers in the dark, a ban on advertising available services will further the interest in promoting DFW to the exclusion of Love Field. *See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 342, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986) (prohibiting casino advertising would further government's interest in reducing demand); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 569, 100 S.Ct. 2343, 2353, 65 L.Ed.2d 341 (1980) ("There is an immediate connection between advertising and demand for electricity.") Nor is the statute more extensive than necessary to serve the interest. It does not prohibit the knowledgeable consumer from receiving the information she seeks upon request.

The restriction on speech does not have to be the least restrictive available. Instead, there must be a " 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Board of Trustees,* 492 U.S. at 480, 109 S.Ct. at 3034 (quoting *Posadas,* 478 U.S. at 341, 106 S.Ct. at 2976). There is clearly such a fit here as the advertising restrictions will lead more people to fly through DFW than would be the case if they knew service was available through Love Field.

Accordingly, we find that the Wright Amendment's restrictions on commercial speech do not impermissibly abridge the First Amendment.

In conclusion, we join the Fifth Circuit to find that the Wright Amendment does not violate the Constitution. We therefore grant defendants' and intervenors' motions for summary judgment and deny plaintiffs' motion.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 91-0233

STATE OF KANSAS, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

ORDER

In accordance with the Memorandum Opinion filed this day, it is, by the Court, this 30th day of June, 1992, hereby

ORDERED that Plaintiff's Motion for Summary Judgment, or in the alternative, for Partial Summary Adjudication, is denied; and it is

ORDERED that Defendants' and Intervenors' Motions for Summary Judgment are granted; and it is

FURTHER ORDERED that this case is dismissed with prejudice.

/s/ John H. Pratt
John H. Pratt
United States District Judge

APPENDIX E

STATUTORY PROVISIONS INVOLVED

Section 29 of the International Air Transportation Competition Act of 1979, Pub.L. No. 96-192, 94 Stat. 35 (1980).

Sec. 29. (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder,

no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979.

APPENDIX F

Order 85-12-81

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

No. 43307

LOVE FIELD AMENDMENT PROCEEDING

Issued by the Department of Transportation
on the 31st day of December, 1985

ORDER

By Order 85-7-65 (July 26, 1985), the Department requested comments on the interpretation of the Love Field Amendment (Amendment) (Sec. 29, International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35 (1980)), which restricts service by air carriers at Love Field, Texas.[1] Our request for comments followed

[1] The question of proper interpretation of the Love Field Amendment was previously raised in the Southwest Airlines—Muse Air Acquisition Proceeding, where the Department found it unnecessary to reach the issue in its decision. Order 85-6-79 (June 24, 1985). We did, however, suggest that the issue should be resolved in another context. Id.

announcement by Continental Airlines of its intention to commence service at Love Field and opposition of various persons to this service. On July 10, 1985, the Dallas/Fort Worth (DFW) Parties[2] submitted a letter to the Department's Office of Aviation Enforcement and Proceedings seeking an informal enforcement investigation and order prohibiting Continental's proposed service.

In view of the current dispute regarding Love Field service, and because the issue is primarily a question of law, we asked for comments to assist us in interpreting the Amendment. Responders were asked to specifically address the questions of whether an air carrier can serve Love Field on a non-interline basis, if the carrier interlines elsewhere on its system; and whether the Amendment applies to intrastate service. We received comments and reply comments from: Air Midwest, America West Airlines, Continental Air Lines, the Dallas/Fort Worth Parties, Delta Air Lines, the Department of Justice, the Regional Airline Association, Republic Airlines, and Southwest Airlines, Co., and several letters from the general public. In addition to comments concerning statutory interpretation, several parties raised related questions about marketing of Love Field services in a manner consistent with provisions of the Amendment. We have considered all comments and have also taken notice of Orders 80-3-9, 80-5-12, 80-8-181, and 80-12-102 of the Civil Aeronautics Board, the pleadings in City of Dallas v. CAB, Case Nos. 80-2064 and 81-1192 (D.C. Cir. 1980), and the legislative history of the Amendment in interpreting its meaning.

After careful review of these matters, the Department has decided that: 1) Continental's proposed service be-

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[2] The DFW Parties are the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas—Fort Worth International Airport Board.

tween Love Field and Houston, Texas, does not violate the Love Field Amendment; 2) the Amendment does not apply to flights by intrastate carriers or intrastate service by an 'air carrier'; 3) upon the request of passengers, Continental or its agents may sell 'double tickets' to passengers continuing on a different aircraft and flight beyond an authorized destination from Love Field; 4) however, neither Continental nor its agents may list in any manner, including a computer reservation system, a flight from Love Field as a 'connection' to a point beyond the Love Field authorized service area; 5) Delta, or any other airline, may list in its computer reservation system flights from Love Field by a certificated carrier using small aircraft in the same manner as commuter carrier flights; and 6) intrastate and air carriers may provide service between Love Field and other points within the state of Texas so long as they do not use this service to avoid the Love Field Amendment's restrictions on interstate air service.

BACKGROUND

Since the completion of Dallas/Ft. Worth Regional Airport (DFW), which resolved a long-standing rivalry between Dallas and Ft. Worth for interstate service to their communities, the DFW Parties have sought to prohibit interstate service at other area airports. The DFW Parties, in fact, previously asked the CAB to prohibit interstate service at area airports other than DFW, especially Love Field. The CAB refused to do so. The DFW Parties' argument for this prohibition in the years immediately following completion of the regional airport was that interstate operations at Love Field would damage the viability of the new airport. See Order 79-9-192 (September 28, 1979).

In addition, the Airline Deregulation Act of 1978 (Pub. L. 95-504, 92 Stat. 1705 (1978)) substantially changed the Federal government's regulatory oversight of air trans-

portation. In particular, the Act includes a provision, as part of the listing of public interest elements, concerning the use of satellite airports and the power of regional authorities over their use. Section 102(a)(6), 49 U.S.C. 1302(a)(6). Some members of the House of Representatives apparently believed this provision would prohibit the CAB from authorizing interstate service at Love Field, but the Conference Report on the subsequently passed Love Field Amendment indicates the Senate did not share this view. S. Rep. No. 96-531, 96th Cong., 1st Sess. (1980) [hereafter, Conference Report]. The Deregulation Act also includes provisions, known as the Automatic Market Entry (AME) program, that allowed carriers to enter certain markets prior to complete route deregulation without a CAB finding that entry was needed. Section 401(d)(7), 49 U.S.C. 1371(d)(7). Under the AME provisions, the CAB ruled that Southwest Airlines could provide interstate service from Love Field, notwithstanding section 102(a)(6). Order 79-9-192 (September 29, 1979).

Congress subsequently addressed the dispute respecting service at Love Field in an amendment to the International Air Transportation Competition Act (IATCA). Congressman Jim Wright initially introduced an amendment to IATCA, passed by the House, that effectively prohibited all interstate air service at Love Field. However, the Senate version of IATCA contained no similar provision. The Conference Committee adopted a compromise solution to settle the controversy, producing the current Love Field Amendment. It rejected Congressman Wright's total ban on interstate air service at Love, but imposed substantial restrictions. Subsection (a) of the Amendment prohibits the CAB or its successor from authorizing interstate service (other than limited charter and commuter flights) to Love Field, except in accordance with remaining provisions of the Amendment. Subsection

(b) prohibits interstate scheduled service at Love Field, except in accordance with other provisions of the Amendment, or if such service was operated before November 1979. This section assured that Southwest could continue to operate Love Field service the CAB had previously authorized. Subsection (c) defines the scope of permissible service as follows:

> (c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such state. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

Continental does not plan on operating from Love Field beyond the five-state area specified in (c), an action which would be clearly prohibited. Rather, Continental plans to serve Love Field with flights to Houston. Continental has interline agreements with other carriers and provides interline service at its Houston hub. Thus, in interpreting the Amendment, we must interpret the interline prohibition contained in (c)(1) to determine whether the Amendment should be construed to prohibit a carrier that interlines elsewhere on its system from serving Love Field, or whether it should be construed merely to prohibit interlining in connection with service at Love Field.

The Dallas—Ft. Worth Parties and Southwest argue that the Amendment prohibits service at Love Field by carriers that interline anywhere on their systems, even if no interline service is provided on flights serving Love Field. The Justice Department disagrees, arguing that Congress' intent in enacting the Amendment was to prohibit interlining only in connection with Love Field service. Justice notes that this view is consistent with prior CAB interpretations of section (c)(1).

The CAB's most detailed interpretation of the interline prohibition occurred in connection with an airport notice filed in 1980 by Texas International Airlines (TI) to inaugurate interstate service from Love Field.[3] The airport notice was opposed by Southwest and the DFW Parties on the grounds that the Amendment prohibited Love Field service by interlining carriers, such as TI, even if the carrier did not provide interline service from Love.[4] The CAB disagreed and permitted TI to institute the proposed interstate service, interpreting the Amendment as restricting interlining on flights serving Love Field, rather than as a total prohibition on serving Love Field by carriers that interline elsewhere on their systems. Order 80-8-181 (August 29, 1980).[5] The DFW Parties sought judicial review of that order City of Dallas v. CAB, Case Nos. 80-2064 and 81-1192 (D.C. Cir. 1980). The

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[3] TI was subsequently merged into Continental after its parent, Texas Air Corporation, acquired Continental.

[4] Unlike TI, Southwest, which had previously been authorized by the CAB to provide service at Love, did not interline with other carriers elsewhere on its system. Order 79-9-192 (September 29, 1979).

[5] In addition, the CAB found that the Amendment's restrictions, while statutory and clearly applicable without further regulatory action, should be embodied in certificates authorizing such service, as intended by Congress (Conference Report at 25). Order at 6.

issue, however, was never resolved, because TI discontinued its Love Field service during the course of the appeal; and the case was dismissed as moot.

Continental's proposed service at Love Field is similar to the earlier service of TI approved by the CAB. The issues and positions of interested parties remain much the same as in TI's 1980 application. After careful review of comments, the plain words of the Amendment, and its legislative history, we have determined that the CAB properly interpreted subsection (c)(1) as only prohibiting interlining on flights serving Love Field. Thus, we find the Amendment does not prevent Continental from providing service between Love Field and Houston.

OPERATIONS BY AN AIR CARRIER WITH INTERLINE SERVICE

The Department interprets the Amendment as not prohibiting non-interline service at Love Field by an air carrier that provides interline service elsewhere on its system. The DFW Parties, Southwest, and Republic, who do not agree with this interpretation, contend that we should first look to the plain wording of the Amendment to ascertain Congressional intent, unless the literal wording of the statute would lead to 'unreasonable' or 'incongruous' results. United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940). We do not disagree.

In examining the wording of the Amendment, it is clear that the critical part of subsection (c) is one sentence regarding service by 'an air carrier' 'on a flight between Love Field, Texas,' and points in Texas and the adjacent four states. Subclause (1) prohibits 'such air carrier' from offering or providing through service or ticketing with other carriers; and subclause (2) prohibits the carrier from offering for sale transportation to a point outside the authorized area, and serving such a point on a flight that

also serves Love Field. In our view, the plain and literal meaning of subsection (c) refers to a specific 'flight,' and subclauses (1) and (2), which must logically be read together (the clauses are joined by the conjunction 'and'), describe restrictions applicable to the flight. As further discussed below, the legislative history is not contrary to this plain reading; and this reading is not unreasonable. See, Nat'l Small Shipments Traffic Conference v. CAB, 618 F.2d 819 (D.C. Cir. 1980).

The DFW Parties and Southwest offer a significantly different reading of the literal words of subsection (c). Their proffered meaning rests on the assumption that subclauses (1) and (2) must be read separately. Under this interpretation, subclause (1) describes a class restriction, prohibiting any carrier that interlines elsewhere on its system from serving Love Field; while subclause (2) describes an operational restriction, prohibiting this class of carrier from serving Love Field beyond Texas and the four-state area. Thus, the DFW Parties and Southwest contend that subsection (c)(1) is clear in its terms: a carrier that conducts any interlining operations is precluded from offering interstate service at Love. Moreover, under this interpretation, any conflict between subclauses (1) and (2) is illusory; since the DFW Parties and Southwest argue that it is logical to apply subsection (c)(1) universally, while applying (c)(2) only in connection with operations at Love Field.

The Board rejected this reading of subsection (c) as unreasonable, finding that provisions of the Amendment must be read in harmony. Order 80-8-181, at 4 (August 29, 1980). As the CAB stated, to agree with this interpretation of (c)(1) would require a reading of (c)(2) prohibiting an air carrier providing service at Love from providing any service outside Texas and the four adjacent states, even operations unconnected with Love Field

service. Id.[6] This interpretation would be inconsistent with the statements of the Conference Committee that carriers providing interstate service at Love were not precluded from operating outside the five-state area, as long as through or connecting services to points outside the area were not offered in connection with the carriers' Love Field service. Conference Report at 25-26. It is also inconsistent with the remainder of subsection (c) and the rest of the Amendment, which envisions and regulates interstate service at Love Field. Further, the Conference Report specifically states that carriers' usual ticketing, scheduling, and ratemaking practices would not be otherwise affected. *Id.* To read the subclauses separately effectively undercuts the Amendment, suggesting that Congress enacted a self-defeating statute. As the CAB found, Congress intended that carriers providing interline services elsewhere on their systems could provide service at Love Field, as long as they did not provide interline service to points outside the five-state area in connection with their Love Field services. Order 80-8-81 at 5. We agree.

Moreover, our plain reading of the Amendment is supported by a customary understanding of English grammar. To support their interpretation, the DFW Parties and Southwest would have us change the conjunction between the subclauses from 'and' to 'or,' in order to read the clauses separately. However, the clauses are joined together in one sentence as connected restrictions on permitted interstate service at Love Field and used as descriptive modifiers of the term 'flight.' A contrary reading is grammatically strained and leads to unreasonable and incongruous results, as noted above.

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[6] While this outcome might be acceptable to the DFW Parties, Southwest would probably object.

Nor can we accept the arguments of the DFW Parties and Southwest that the CAB improperly modified the language of the Amendment by somehow reading into subclause (1) the words 'on a flight' that precede that subclause. Interestingly, in urging their own interpretation, the DFW Parties and Southwest engage in the same type of error they accuse the Board of having made. Strained modification of language is not necessary to understand the plain meaning of subsection (c); subclauses (1) and (2) must be read together in the context of the entire sentence in which they appear.

All commenters, as well as this Department, believe the Amendment's legislative history supports their reading of the plain meaning of the provision. As discussed more fully below, we find that the legislative history, when reviewed as a whole, supports our interpretation of the Amendment. This finding is consistent with the views of Continental Airlines, America West, and the Department of Justice.

The DFW Parties and Southwest contend that the legislative history embodied in the Conference Committee Report supports their position that Congress intended to preclude from Love Field service carriers conducting any interlining elsewhere on their systems, citing the Conference Report at 24. These parties discount colloquy and statements on the floor of the House and Senate by members of the Conference Committee and floor managers of the legislation indicating that the Committee intended the interlining restrictions to apply only to Love Field service. They further suggest that the Amendment should be considered in the context of 'broader' history, noting that the provision of the 1978 Airline Deregulation Act defining services at satellite airports as an element of the public interest was amended to provide that this should be the case only where regional airport authorities and

plans supported the use of such satellite airports. They point out that Congressman James Wright assumed this amendment of the Deregulation Act would prohibit the CAB from authorizing interstate service at Love Field. When the Board subsequently authorized Love Field service, Congressman Wright introduced an amendment to the IATCA of 1979 that would have prohibited interstate service at Love. The House adopted this amendment, but the Senate version of IATCA included no comparable provision. While the DFW Parties and Southwest do not dispute that the current version of the Love Field Amendment was a compromise agreed to in conference, they nonetheless argue that Congress intended this provision to be very restrictive.

In our view, the legislative history, properly read, supports a less restrictive interpretation of the interline provision. The Conference Report begins by stating: 'Section 29 as approved by the conferees embodies a compromise which permits limited commercial passenger service in interstate transportation at Love Field.' Conference Report at 24. In addition, Congress clearly knew the extent of interlining practices among air carriers, since the Airline Deregulation Act and IATCA itself (specifically sections 11, 14 and 15) contain provisions involving agreements and fares;[7] and the Report is clear that usual ticketing, scheduling, and ratemaking practices would not be otherwise affected, beyond the specific Love Field restrictions. Conference Report at 26.

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[7] The DFW Parties and Southwest assert that the Amendment takes precedence over, and need not be harmonized with, IATCA and the earlier Deregulation Act. Even if this is so, it is not reasonable to assume that Congress would have adopted the Amendment with the purpose of granting a carrier (Southwest) a de facto monopoly position at Love Field after having enacted prior legislation with the primary purpose of placing greater reliance on competitive and market forces to protect the public interest.

The Conference Report continues: 'Subsection c permits turnarous service between Love Field and points in the four contiguous states.' The turnaround nature of the authorized flights is repeated in the next paragraph. The DFW Parties' and Southwest's analysis of legislative history focuses almost entirely on the following paragraph. While those parties contend that that paragraph indicates that carriers who interline anywhere on their systems are barred from serving Love Field, the paragraph, in fact, is merely a repetition of the words of the Love Field Amendment. The Conference Committee more fully explained the meaning of that language in the next paragraph—an explanatory paragraph the DFW Parties and Southwest have apparently ignored. That paragraph begins: 'Thus, a carrier providing service from Love Field to a point in one of these states is not forbidden from providing service from that point to other points in other states beyond . .' The Conference Report continues: 'While it could not sell through tickets . . . between Love Field and points beyond the contiguous states, its usual ticketing, scheduling and ratemaking practices would not be otherwise affected.' Since Congress knew that these enumerated practices constituted interlining, it is not reasonable to argue that Congress intended to bar air carriers who interline elsewhere on their systems from serving Love Field.

The legislative history supports our view that Congress intended to make Love Field a short-haul airport limited to turnaround intrastate and interstate service in five states. As a result, subclauses (1) and (2) are not properly read as class and operational restrictions, respectively. Rather, these subclauses simply specify interline and online restrictions applicable to service at Love Field.

Moreover, statements of Congressman Anderson of California and Senator Cannon of Nevada also support this interpretation of the Amendment. Each was a mem-

ber of the Conference Committee, and each was the floor manager of the bill reported out of the Conference Committee. The views of Conference Committee members and floor managers are entitled to greater weight than that usually afforded the views of individual legislators, especially where such expressed views are consistent with other elements of the legislative history. Train v. Colorado Public Interest Group, 426 U.S. 1, 14 (1976). The DFW Parties and Southwest rely on the statements of Congressman Wright in support of the House version of the bill, rather than those of Congressman Anderson and Senator Cannon in support of the Committee version; however, Congressman Wright was not a member of the Conference Committee, the bill reported by that Committee was not the House version he had sponsored, and both the House and Senate accepted the compromise provision reported out by the Conference Committee.

On the floor of the House, Congressman Anderson, explaining the Amendment, said: 'The prohibition in section 29(c)(1), against an air carrier providing through service or ticketing with another air carrier . . . only applies with respect to a carrier's Love Field service . .' 126 Cong. Rec. H. 520 (February 4, 1980). In a colloquy on the Senate floor, Senator Cannon expressed the same understanding. 126 Cong. Rec. S. 952 (February 5, 1980). The legislative history, taken as a whole, supports our view that the intent of Congress in the Love Field Amendment was to limit interstate service at that airport to short-haul, turnaround flights, not to prohibit carriers offering interline services elsewhere from serving Love Field. The floor debates likewise indicate that operations not touching Love Field were not to be included within the prohibitions of the Amendment.

In sum, the Department believes that the plain wording of the Amendment and the legislative history, including the Conference Report and relevant statements

by the Amendment's floor managers, show that our less restrictive interpretation of the Amendment is correct. Thus, we find that Continental may serve Houston from Love Field, although the carrier provides interline services elsewhere on its system. This conclusion is supported by the comments of various parties, including the Justice Department, American West, and Air Midwest. The arguments of the DFW parties and Southwest to the contrary are not persuasive. Further, since we find that Continental may serve Love Field consistent with restrictions of the Amendment, we have determined that it is not necessary to address Continental's additional argument that the amendment may violate the equal protection clause.

Finally, Republic argues that permitting Continental to serve Love Field is unfair in a competitive sense, since our interpretation of the Amendment benefits those carriers who maintain hubs in Texas and the four contiguous states to the exclusion of those who do not. Republic's argument is not convincing. Republic is free to establish its hubs wherever it chooses. There is nothing competitively unfair to Republic in our interpretation of the Love Field Amendment as drafted and intended by Congress.

MARKETING RESTRICTIONS

Continental raised four questions in its comments regarding marketing problems faced by carriers serving Love Field. The statements attached to its comments are a vivid demonstration of the confusion present today in Love Field service. Continental first asks: 1) whether a passenger may buy two tickets (so-called 'double ticketing') at Love Field, one for service from Love Field to a point within Texas or the four adjacent states, and a separate, second ticket for service from that destination to a beyond point; and 2) whether the second ticket may be for the carrier's most efficient connecting flight. The

answer to both questions is yes. To hold otherwise would be unreasonable and beyond that needed to effectuate the Amendment's restrictions. See, CAB Order 80-12-102 (December 18, 1980).

The language of the Amendment and its legislative history indicate that Congress had two concerns in restricting service to Love Field. First, Congress intended to prohibit carriers from providing through service and ticketing beyond the authorized Love Field service area. Conference Report at 25. However, Congress did not intend to preclude a carrier from operating flights from a destination point served from Love Field to a point outside the Love Field service area. Id. at 26. Second, Congress intended to prohibit carriers from promoting, offering, or holding out service from Love Field to a point beyond the service area. Subsection (c). Conference Report at 25. Congress used the word 'offer' in the Amendment itself; although the legislative history refers to 'holding out.' In some contexts, the terms 'offer' and 'hold out' can be used interchangeably. United States v. Contract Steel Carriers, 350 U.S. 409 (1956); Cf. Grajewski v. Commissioner, 723 F2d 1062, (2d Cir. 1983).

'Through service' and ticketing specifically refer to the provision of transportation between an ultimate origin and destination on a single ticket for a single sum fare. Cf. Tariff Flexibility Rulemaking ER-1246, Order 81-81-58 (November 10, 1981). See also, Visit USA/Export/Inland Contract Rate Investigation (VUSA Investigation), Order 84-8-55 at 26 (August 10, 1984). The service may be offered on a single flight with one or more stops, or it may be offered on connections between two flights. The key concept is that it is sold by the carrier, and perceived by the passenger, as a single trip on a single ticket for a single sum fare, thus constituting a single contract.[8]

[8] In the case of connecting flight service, the amount of the fare

Through service provides certain conveniences for the passengers. For example, the passenger need not reclaim checked baggage upon arrival at the connecting point and recheck it on the next flight on his or her itinerary.

In contrast, double ticketing involves the use of two tickets (hence, two contracts of carriage), the payment of two separate fares, and requires the passenger to forego the service conveniences associated with through ticketing. Although Congress prohibited through service and fares at Love Field, it intended that a carrier's 'usual ticketing, scheduling and ratemaking practices would not be otherwise affected.' Conference Report at 26. Such 'other' practices may include double ticketing. Cf. Interstate and Intrastate Fares in California Markets, 71 CAB 23 (1976).

The language of the Amendment makes clear that a carrier cannot advertise, promote, or otherwise affirmatively solicit double-ticketing passengers. The question, then, is whether the sale of double-ticketed service at the unsolicited request of a customer amounts to an offer or holding out. Such a sale is not necessarily an offer. An offer is a proposal to sell a ticket or provide transportation. Frissell v. Nichols, 94 Fla. 403, 114 So. 431, 433 (1927); Cf. Daitom, Inc. v. Pennwalt Corporation 741 F2d 1569 (10th Cir. 1984). If a carrier simply responds to a customer's unsolicited request, it has not proposed to sell air transportation, but, rather, has accepted a proposal to buy such transportation from the customer, although the carrier's acceptance results in a contract. Congress prohibited carriers from 'offering for sale

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may be calculated by simply adding the local fares on individual flight segments, or it may be a different, usually lower, fare reflecting costs or competitive considerations. The key concept, again, is that the fare is stated as a single amount. Cf. VUSA Investigation, Order 84-8-55 at 27.

. . . transportation to or from . . . any point which is outside [the Love Field Service area]'; but neither the wording nor the legislative history prohibits carriers from selling, or passengers from purchasing, transportation to points outside the Love Field service area. While the Amendment prohibits single-plane flights, interline service, through service and ticketing, and advertising and promotion of service outside the Love Field service area, it does not appear that Congress intended to preclude entirely the use of Love Field by passengers who take the effort to find out that double-ticketed service is available, who demand such tickets, and who accept the inconvenience of that service. Thus, to prohibit double ticketing or the sale of a carrier's most convenient flight from a destination in the Love Field authorized service area to a beyond point exceeds what is necessary to prohibit through service and ticketing from Love Field.

Continental's second question, also asked by Delta, is whether a carrier may display in a computer reservations system under 'connections' service from Love Field to a point beyond the restricted service area. The answer is no. The Conference Report is clear on this question. It says that 'carriers may not hold out, offer or advertise Love Field service to or from points beyond the four contiguous states in any respect, including the publication of connecting flights schedules in airline guides, flight schedules, or similar media.' Conference Report at 25. The ban on advertising of service from Love Field beyond Texas and the four contiguous states is clearly envisioned by the Amendment. The phrase 'airline guides, flight schedules, or similar media' includes computer reservations systems. These systems were used at the time of the Amendment's passage and not specifically excluded.

Continental's third, related marketing question is whether a carrier may advertise connecting service and display connecting service, as such, in its flight schedules.

Again, the answer is no. Unsolicited information furnished to the public in any form is a means of offering or holding out, which is prohibited. See, e.g., Red Ball Transit Co. v. Marshall 8 F.2d 321, 323 (S.D. Ohio 1925). Moreover, as discussed above, Congress clearly contemplated prohibiting publication of such flights in individual carrier schedules, as well as industry information media.

Continental's fourth question concerns the marketing of fares and their construction. Continental asks whether a fare could be sold and constructed for service from Love Field to a point outside the restricted service area that is different from the sum of the local fares (Love Field to a point in the authorized area, plus that point to a point outside the service fare.) This practice would clearly involve the offer of a through fare, since it could not be considered as anything but a single sum fare. Moreover, it could not be offered as anything but a single contract of carriage, i.e., a single through ticket. This is different from the double-ticketing situation, discussed above, which involves two separate contracts of carriage. The Conference Committee Report states that '. . . a carrier could not . . . offer through fares between Love Field and points beyond the contiguous States . . .' Conference Report at 26. Therefore, a carrier cannot offer a constructed fare for double-ticketed service originating or terminating at Love Field.

Throughout this discussion of marketing, we have used the term 'carrier' to include travel agents or other persons or methods used by the carrier to sell its tickets and services. Whenever an agent is acting for its principal, the same restrictions applied to the principal apply to the agent.

SMALL AIRCRAFT OPERATIONS

In connection with its computer reservations system, Delta asks whether a certificated carrier using small air-

craft should be treated the same as a commuter carrier serving Love Field. The Amendment specifically authorizes interstate air transportation at Love by commuter airlines using aircraft of 56 seats or less. The term 'commuter airline' is not defined elsewhere in the Amendment. The Amendment's language must, therefore, stand on its own. Since Congress specified the size of the commuter aircraft, and since such aircraft has a limited range consistent with other restrictions of the Amendment, we believe Congress intended aircraft size, rather than license classification of the carrier, to be determinative.[9] Thus, we find that operations by either a certificated or non-certificated carrier using small aircraft are exempt from the Amendment with respect to Love Field operations.

INTRASTATE OPERATIONS

We also asked for comments on whether the Amendment applies to intrastate service within Texas. The Amendment is somewhat ambiguous on this question. Subsections (a) and (b), by their terms, apply only to flights from Love Field to 'points outside the State of Texas.' Subsection (c), however, states that subsections (a) and (b) do not apply to, and under certain conditions carriers may provide, flights between Love Field and 'points within the State(s) of . . . Texas.' The Conference Report states that the 'provisions do not affect . . . intrastate service in Texas.' Conference Report at 25. Thus, we conclude that the Amendment does not apply to service by an intrastate carrier or to service carrying only intrastate passengers by an air carrier.

The more difficult issue, however, is the application of the Amendment to air carriers providing both intrastate

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[9] The Department has taken this approach to all aspects of economic regulation of commuter air carriers. 14 C.F.R. 298.90.

and interstate service on the same flight. The CAB faced this question in Order 80-8-181. It decided that carriers could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area. The Department believes the CAB was substantially correct. In our view, an air carrier providing interstate service within the authorized four-state service area mays provide intrastate service from Love Field on the same flight without violating the Amendment's restrictions. However, the carrier cannot offer, promote, or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.

ACCORDINGLY,

1. Continental or its agents may provide service from Love Field, Dallas, Texas, to Houston, Texas;

2. Continental or its agents may sell a ticket from an authorized destination of a flight from Love Field to a point beyond that destination, if demanded by a passenger, separately from the ticket for the Love Field flight, provided the amount of the tickets equals the sum of local fares;

3. Continental or its agents may not by any means whatsoever list of advertise 'connecting' flights for an authorized Love Field flight to a point beyond the Love Field service area, including listings in a computer reservation system;

4. Delta may list in its computer reservation system service by certificated air carriers that use aircraft of 56 seats or less serving Love Field in a manner similar to listings for commuter air carriers; and

5. The Amendment does not apply to service by intrastate carriers or intrastate service by an air carrier certificated under the Act.

By:
Matthew V. Scocozza
Assistant Secretary for Policy
and International Affairs

Supreme Court, U.S.
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AUG 26 1994
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No. 93-2018

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF KANSAS, *et al.*,
Petitioners
v.
UNITED STATES OF AMERICA, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN AIRLINES, INC.

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QUESTION PRESENTED

Whether the Wright Amendment, which regulates interstate air service to and from Love Field Airport in Dallas, Texas, violates Petitioners' constitutional rights under the Port Preference Clause or to freedom of speech or interstate travel.

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BRIEF IN OPPOSITION OF RESPONDENT AMERICAN AIRLINES, INC.[1]

STATEMENT

The central issue before this Court is whether the potential, minor inconveniences that a commercial airline passenger may experience by choosing to fly to or from the Dallas/Fort Worth metroplex via Love Field, rather than DFW Airport, render the Wright Amendment unconstitutional. The Court of Appeals' rejection of Petitioners' constitutional challenge to the Wright Amendment is consistent with the decisions of this Court, and not in conflict with decisions of other circuits. Furthermore, the Petition does not present an important question of federal law which should be settled by this Court.

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[1] Respondent American Airlines, Inc. ("American") confirms the description of its affiliated companies set forth in the Petition.

Two circuit courts and three district courts (including the courts below) have resoundingly upheld the Wright Amendment against constitutional challenges *identical* to those raised by Petitioners. Undaunted by the numerous opinions rejecting their arguments, Petitioners now seek to reargue these claims before this Court, which has twice denied Petitions for a Writ of Certiorari raising *identical* issues.

A. The Court of Appeals' Decision Conforms to Prior Decisions Upholding the Constitutionality of the Wright Amendment

"The Wright Amendment has been challenged before and has survived." *State of Kansas v. United States*, 797 F. Supp. 1042, 1045 (D.D.C. 1992). (Pet. App. 20a.) Both the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of California have already determined that Petitioners' claims are without merit in suits filed by Petitioners' Counsel, David J. Gallo, Esq. *See Cramer v. Skinner*, 931 F.2d 1020 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 298 (1991), *following remand, aff'd sub nom., Cramer v. Card*, 983 F.2d 232 (5th Cir. 1993), *cert. denied, sub nom., Cramer v. Peña*, —— U.S. ——, 113 S. Ct. 2994 (1993) (hereinafter "*Cramer*"); *and Zamutt v. Skinner, et al.*, Civil Action No. 90-0602-B(M) (S.D. Cal. 1990) (hereinafter "*Zamutt*").[2]

1. Cramer v. Skinner *and Related Opinions*

As in the Petition before this Court, the appellant in *Cramer* argued that the Wright Amendment is unconstitutional because it allegedly violates the First Amendment, the implied constitutional right to travel, and the Port Preference Clause. In *Cramer*, the Fifth Circuit concluded

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[2] For the convenience of the Court, a true and correct copy of the Order of the District Court in *Zamutt* dated December 6, 1990 is included in the Appendix to this Brief.

that the Wright Amendment was constitutional, in part because the appellant's claimed injuries were merely minor inconveniences that attended the appellant's preferred choice of travel, and that such:

> Minor restrictions on travel simply do not amount to the denial of a fundamental right that can be upheld only if the government has a compelling justification. . . . Cramer remains free to travel unrestricted to points outside the Love Field service area from Dallas by using DFW, or he can take a second flight from a point within the Love Field service area. The [Wright A]mendment does not deter Cramer from travelling by air . . . .

Cramer, 931 F.2d at 1031.

The Fifth Circuit in *Cramer* ultimately ruled that the district court properly denied the plaintiff's motion for summary judgment, and was prepared to "order judgment on the merits for the Government." *Cramer*, 931 F.2d at 1035. However, because the government had not cross-appealed from the district court's failure to grant the government's motion for summary judgment, the Fifth Circuit remanded the case to the district court "with instructions . . . to consider the government's motion for summary judgment and for further proceedings consistent with this opinion." *Cramer*, 931 F.2d 1020 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 298 (1991). The district court, in an unpublished opinion, granted summary judgment in favor of the government. Upon the subsequent appeal from the grant of summary judgment, the Fifth Circuit affirmed without further opinion, and this Court denied certiorari. *Cramer v. Card*, 983 F.2d 232 (5th Cir. 1993), *cert. denied, sub nom., Cramer v. Peña*, —— U.S. ——, 113 S. Ct. 2994 (1993).

2. Zamutt v. Skinner

Zamutt was dismissed on both a jurisdictional basis (lack of standing) and on the merits. The court con-

cluded, *inter alia*, that the Wright Amendment "does not deprive Plaintiff of her First Amendment right to hear [commercial speech] or her fundamental right of interstate travel." (Amer. App. 2a.) The *Zamutt* court also granted summary judgment in favor of the defendants on the grounds that the Wright Amendment does not violate the Port Preference Clause.[3] (Amer. App. 2a.)

3. *Cases Upholding Airport Regulations Similar to the Wright Amendment*

The cases upholding the constitutionality of the Wright Amendment are in accord with opinions upholding the constitutionality of regulations that restrict the use of designated airports in cities with multiple airports.

In *City of Houston v. Federal Aviation Administration*, 679 F.2d 1184 (5th Cir. 1982), the Fifth Circuit upheld the constitutionality of a federal regulation that prohibits nonstop service to or from Washington National Airport and any airport beyond a thousand-mile perimeter. Similarly, in *Western Air Lines, Inc. v. Port Authority*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), the Second Circuit upheld the constitutionality of a local "perimeter" regulation that restricts flights to or from New York's La Guardia Airport.

B. Statement of Facts

An understanding of the background of the Wright Amendment is necessary to an examination of the issues presented by the Petition.

1. *The Wright Amendment Does Not Interfere With the Right to Travel to and From the Metroplex*

The Dallas-Fort Worth International Airport ("DFW" or "DFW Airport") is the primary airport in the Dallas-Fort Worth metropolitan area (the "Metroplex") and the

[3] No appeal was taken from the decision of the District Court in *Zamutt*.

second busiest airport in the United States. It is located 18 miles from the center of Dallas. Love Field, Dallas' short haul airport, is six miles from the center of Dallas, and is *merely twelve miles* from DFW.[4]

2. *The Wright Amendment Serves the Government's Interests in Apportioning Air Travel Resources and Resolving a Longstanding Dispute Between Dallas and Forth Worth*

Love Field was built and operated by the City of Dallas as its airport at a time when Fort Worth, whose center is 31 miles from the center of Dallas, also had its own airport. For many years these two cities bitterly disputed the issue of which city should have the primary airport for the Metroplex. The two cities' operation of separate and competing airports created substantial expenses for the carriers serving the area and impaired the quality of the area's airline services. *State of Kansas*, 797 F. Supp. at 1044-45 (Pet. App. 18a-20a).

In the late 1960's the two cities agreed to end their decades of rivalry and resolve their dispute by pooling resources and building a new airport, DFW Airport, and by consolidating the area's airline services at that airport. To that end, each city agreed to phase out scheduled commercial services from its respective local airports and agreed to refrain from any acts or policies competitive with DFW. Without these commitments, DFW would never have been built, and the commitments remain in force and effect today.

Southwest Airlines, which was not at that time a Civil Aeronautics Board ("CAB") certificated carrier, refused to move to DFW, but was permitted to continue to provide intrastate air travel services from Love Field. *City*

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[4] American's factual recitation is undisputed by Petitioners and supported by the Affidavit of Melvin F. Olsen, Vice President—Capacity Planning for American, contained in the record as Exhibit I" to American's Statement of Material Facts in Support of its Summary Judgment Brief to the District Court.

of Dallas v. Southwest Airlines Co., 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 194 F.2d 773 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1975) (holding that, under Texas law, the contract between Dallas and Fort Worth could not prevent an intrastate carrier licensed by the now defunct Texas Aeronautical Commission from serving Love Field). After deregulation of the airline industry in 1978, Southwest was authorized by CAB to implement interstate services from Love Field to New Orleans, *Southwest Airlines Automatic Entry Investigation*, CAB Order 79-9-192 (September 28, 1979), thus raising once again the commitment of the cities to move all interstate services in the Metroplex to DFW.

Many constituencies in the Metroplex clamored for either the elimination of all commercial air services from Love Field or the restriction of Love Field to intrastate flights. These parties included the City of Fort Worth (which had closed its own airport in fulfillment of its commitment to DFW), numerous airlines (which vacated Love Field and constructed new facilities at DFW), and neighborhood groups from the Love Field area (which relocated to or remained in the area based upon representations that airline service at Love Field would be curtailed or eliminated). Other groups (including the special interest group supporting Petitioners) sought to abrogate all restrictions on the use of Love Field.

3. *The Wright Amendment Embodies a Legitimate Legislative Policy and Furthers Significant Government Interests*

In 1980, Congress enacted Section 29 of the International Air Transportation Competition Act of 1979, P.L. 96-192, 94 Stat. 35, 48-49 (1980) (Pet. App. 2a-3a), commonly known as the Wright Amendment. The Wright Amendment was enacted to "provide[] a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years." H.R. Rep. No. 96-716, 96th Cong., 1st Sess. 24 (1979). The Wright Amend-

ment reflects Congress' legitimate policy interest in furthering improved air service to the Metroplex by subordinating Love Field to DFW Airport. This legislative compromise was agreed to by "Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW Airport authority, and related constituent groups." *Id.*

4. *Invalidation of the Wright Amendment Will Damage DFW and Create More Travel Inconveniences Than it Alleviates*

As a hub airport, DFW operates on the fundamental principle of combining demand for air transportation to and from the hub city with demand for flights between cities in all directions around DFW. Connecting passengers using the hub "subsidize" a level and diversity of air service which the Metroplex itself could not sustain. Because the Wright Amendment enables American and Delta Air Lines, Inc. to concentrate their flights at a hub, Metroplex residents and the travelling public benefit from nonstop service to over 140 destinations worldwide.

Revoking the Wright Amendment would cause substantial damage to DFW and to its ability to serve as an engine driving the economy of North Central Texas. If the geographic scope of permissible service from Love Field were expanded, American and other DFW carriers would be forced to split their operations between DFW and Love Field to remain competitive in the local Dallas market. As services were shifted from DFW to Love Field, DFW would lose a substantial portion of the feed traffic which today supports the current superior level of service. Paradoxically, expanding service at Love Field would cause an overall decline in the level and scope of air service for the region.

SUMMARY OF ARGUMENT

I. Original Jurisdiction

This Court has invoked its original jurisdiction sparingly, particularly where, as here, a suitable alternative forum is available. It is extremely unlikely that this Court would have accepted original jurisdiction in this case. Moreover, because Petitioners chose to eschew the assertion of original jurisdiction, there is no reason or precedent for this Court to give special consideration to the Petition.

II. Port Preference Clause

The Wright Amendment does not violate the Port Preference Clause, which, as interpreted by the courts, has been rendered virtually a historical nullity. The effects of the Wright Amendment fall squarely within both of the recognized exceptions to the Port Preference Clause; they are incident to a legitimate congressional regulation of commerce; and result more from an accident of geography than from an intentional government preference.

III. Commercial Speech

The restrictions imposed by the Wright Amendment do not violate the First Amendment protection of truthful commercial speech. To the extent that the Wright Amendment prohibits the dissemination of misleading information implying that air carriers may lawfully provide through service from Love Field to places beyond the geographical limits imposed by the Wright Amendment, it does not affect truthful commercial speech and does not implicate the First Amendment. To the extent that the Wright Amendment does impose restrictions on truthful commercial speech, it satisfies the three-part *Central Hudson* test.

The Court of Appeals correctly refused to apply heightened scrutiny to the Wright Amendment's regulation of

commercial speech because its restrictions do not impinge upon any constitutionally protected activity of Petitioners.

IV. Right of Interstate Travel

The Wright Amendment does not violate Petitioners' constitutional right to travel. It operates as a trivial, inconsequential impediment to interstate travel. Petitioners' argument reduces to a feeble claim for a constitutional right to the most convenient form of travel. Moreover, passengers who choose to travel to and from places outside the Love Field service area via Love Field, rather than DFW Airport, are not classified by the Wright Amendment in such a way as to impringe upon constitutionally protected rights. Thus, the Wright Amendment does not violate the Due Process Clause of the Fifth Amendment.

The Petition should be denied.

ARGUMENT

I. THERE IS NO BASIS FOR THE NOVEL THEORY THAT SPECIAL CONSIDERATION BE GIVEN TO PETITIONS FOR A WRIT OF CERTIORARI IN ORIGINAL JURISDICTION CASES

Original jurisdiction would not have been exercised in this case. It has long been the philosophy of this Court that its original jurisdiction should be invoked sparingly. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *United States v. Nevada*, 412 U.S. 534, 537-8 (1973); *Utah v. United States*, 394 U.S. 89 (1969). "Indeed, Chief Justice Fuller wrote nearly a century ago that [the Supreme Court's] original 'jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.' " *Mississippi v. Louisiana*, —— U.S. ——, 113 S. Ct. 549, 552 (1992), quoting *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). This Court is "particularly reluctant

to take original jurisdiction of a suit where the plaintiff has another adequate forum . . . ." *United States v. Nevada*, 412 U.S. at 537-538.

Determining whether a case is appropriate for original jurisdiction involves an examination of two factors. First, this Court looks to the nature of the interest of the complaining state, focusing on the seriousness and dignity of the claim. Secondly, it explores the availability of an alternative forum. *Mississippi v. Louisiana*, 113 S. Ct. at 552-553.

In this case, the availability of a suitable alternative forum is self-evident from the proceedings below. Furthermore, the alleged injury suffered by the State of Kansas is not sufficiently serious for this Court to have taken original jurisdiction. The Court of Appeals held that the State of Kansas had very limited standing to sue, a determination that Petitioners have not challenged in this Court. *State of Kansas v. United States of America*, 16 F.3d 436, 439 (D.C. Cir. 1994) (citations omitted). (Pet. App. 5a.)

In short, the seriousness and dignity of the claim of the State of Kansas as an employer, which would occasionally send its employees by air to Dallas, does not rise to the threshold that would have justified Petitioners' seeking to invoke the original jurisdiction of this Court. Moreover, there is no reason and certainly no precedent for the suggestion that this Court should treat this Petition with special consideration, as the Petitioners eschewed any attempt to assert original jurisdiction.

II. THE WRIGHT AMENDMENT DOES NOT VIOLATE THE PORT PREFERENCE CLAUSE

A. The Port Preference Clause Is a Narrow Exception to Congress' Power to Regulate Commerce

In the forefront of their attack on the Wright Amendment, Petitioners rely on an obscure provision of the Con-

stitution aptly described by the District Court as "almost a historical nullity." *State of Kansas*, 797 F. Supp. at 1048. (Pet. App. 27a.) The District Court recognized that:

> The [Port Preference] Clause has been interpreted only rarely over the last two hundred years, but the limited existing jurisprudence indicates that it operates as a narrow exception to Congress' power to regulate commerce.

Id. at 1048. (Pet. App. 27a.)

The purpose of the Port Preference Clause was to give small states protection against attempts by the more powerful states deliberately to discriminate against them. *City of Houston*, 679 F.2d at 1198. The District Court below noted the limited viability of the Clause:

> The Port Preference Clause has been construed so narrowly that we think only a statute that required all planes leaving or entering Texas to first land in one of the contiguous states would violate the Port Preference Clause.

797 F. Supp. at 1051, n.12. (Pet. App. 32a.)

In denying Petitioners' Port Preference Clause arguments, the Court of Appeals summed up the reason for the paucity of authority by observing that "[the Port Preference Clause] has simply not yet been seriously impinged upon." *State of Kansas*, 16 F.3d at 439. (Pet. App. 6a.) This statement was made by the Court of Appeals after consideration of the prior unsuccessful challenges to the constitutionality of the Wright Amendment made by parties represented by Counsel for the Petitioners in a "virtually identical" lawsuit, *Cramer*, 931 F.2d 1020, *cert. denied*, 112 S. Ct. 298 (1991). *State of Kansas*, 16 F.3d at 439.

Nevertheless, while failing to draw the attention of this Court to either the foregoing decisions or the other pertinent Port Preference Clause decision of the Fifth Circuit

(*City of Houston*, 679 F.2d 1184), Petitioners would have this Court accept the argument that air travellers have a constitutional claim because of the minor inconveniences [5] encountered by virtue of their choosing to embark or disembark at Love Field rather than DFW Airport.

B. Recognized Exceptions to the Port Preference Clause Validate the Wright Amendment

In determining whether a statute violates the Port Preference Clause, courts recognize two broad exceptions that validate statutes that might seemingly violate the Clause:

> Government actions do not violate the Clause even if they result in some detriment to the port of a state, where they occur (i) as an incident to some otherwise legitimate government act regulating commerce or (ii) more as a result of the accident of geography than from an intentional government preference.

City of Houston, 679 F.2d at 1197. In *Cramer*, the Fifth Circuit, like the District Court below, held that the Wright Amendment meets the criteria of both exceptions. *Cramer*, 931 F.2d at 1032.[6]

1. *The Wright Amendment Is Incident to a Legitimate Regulation of Commerce*

The Fifth Circuit in *Cramer* held that "Congress did not decide to cut back service at Love Field, as Cramer assumes, for no reason. Congress enacted the [Wright] Amendment incident to its legitimate regulation of interstate airline service and pursuant to its rational decision

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[5] Petitioners describe these inconveniences as *heavy burdens* (Pet. 4), but this description has not met with judicial acceptance in any of the decisions in which the constitutionality of the Wright Amendment has been challenged.

[6] The Court of Appeals determined that the Wright Amendment satisfied the first criteria, but not the second. *State of Kansas*, 16 F.3d at 441 n.4 (Pet. App. 9a).

to maintain the agreement between Dallas and Fort Worth." *Id.* 931 F.2d at 1032.

The Court of Appeals in this proceeding properly analyzed the alleged benefit to air travellers from the states contiguous with Texas as being an insignificant, incidental result of:

> the very substantial and undeniably legal preference bestowed on DFW as against Love Field. The Supreme Court, long ago, recognized that the Clause does not bar "incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce, and confessedly within its powers."

State of Kansas, 16 F.3d at 440-441, quoting *Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 439 (18 How) (1856). (Pet. App. 8a-9a.) "Congress may enact laws which 'greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring states.' " *Alabama Great Southern Ry. v. United States*, 340 U.S. 216, 229 (1951), quoting *Louisiana Public Service Comm'n v. Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931). Thus, the Wright Amendment falls within the first exception to the application of the Port Preference Clause.

2. *The Wright Amendment's State Restrictions Result from an "Accident of Geography"*

Courts have long held that a port preference that results as a matter of geography does not violate the Port Preference Clause. *Alabama Great Southern Ry. v. United States*, 340 U.S. 216. In *City of Houston*, the plaintiffs attacked under the Port Preference Clause regulations of the Department of Transportation and the Federal Aviation Administration that impose a "perimeter rule" on the Washington National Airport. The perimeter rule prohibits air carriers from operating non-stop flights between Washington National and any airport more than

a thousand miles away. By restricting long haul flights to Washington National, the perimeter rule protects Washington's Dulles International Airport, preserves National's short haul status, and controls the increasing traffic at Washington National. *City of Houston,* 679 F.2d at 1188, 1191.

The Fifth Circuit in *City of Houston* held that the perimeter rule did not violate the Port Preference Clause because any discrimination against western states as a result of the perimeter rule was an "accident of geography," and not the result of deliberate discrimination against a named state or states. *Id.* at 1198. Similarly, the District Court below determined that the analysis applicable to perimeter rules applies equally to the Wright Amendment's restrictions:

> The use of political boundaries in lieu of geographical ones does not, without more, turn an otherwise permissible "accident of geography" into an impermissible use of state power. This would be elevating form over substance.

State of Kansas, 797 F. Supp. at 1051. (Pet. App. 32a.)

C. The Wright Amendment Does Not Impermissibly Prefer the Ports of One State Over Those of Another

As the Fifth Circuit recognized in *Cramer*, the instant case falls squarely within the holding of *City of Houston.* In *Cramer*, the appellant (like Petitioners here) attempted to distinguish the Wright Amendment from the perimeter rule by arguing that the latter was facially neutral because it did not discriminate against a named state or states and, thus, any effect on air travel resulting from the perimeter rule was incidental and due to geographic reasons. *Cramer*, 931 F.2d at 1030-31. Under Petitioners' reasoning, the Wright Amendment would not violate the Port Preference Clause if the restrictions were defined in terms of distance even though that definition encompassed the very same states that are named and about

which Petitioners now complain. The Fifth Circuit rejected this contention:

> [W]e reject Cramer's assertion that the use of state borders for definitional purposes violates the Constitution.

Id. Any preference given to the states which happen to be contiguous with Texas by virtue of the short haul status imposed upon Love Field is merely incidental to the legitimate governmental act of regulating air transportation, and ultimately of minimal significance. "The Wright Amendment does not require that all flights from Kansas to Texas first stop in one of the four contiguous states; it only conditions those heading to or leaving from Love Field. Nothing is stopping flights from Kansas flying directly to DFW, only a few miles from Love Field." *State of Kansas*, 797 F. Supp. at 1051. (Pet. App. 32a.)

D. The Wright Amendment Does Not Violate the Second Sub-part of the Port Preference Clause

Petitioners argue that the two sub-clauses of the Port Preference Clause have different effects. However, the Fifth Circuit's analysis of the Port Preference Clause in *City of Houston* is plainly applicable to both sub-clauses. Although the prohibition against preferring one state over another appears to be facially absolute, its application has been significantly restricted by judicial interpretation.

Petitioners attack the clear logic of the determination of the Court of Appeals that the Wright Amendment does not literally violate the Port Preference Clause by claiming that the Wright Amendment operates asymmetrically on aircraft depending upon the direction in which they happen to be flying. While the Court of Appeals, in explaining its reasons for rejecting Petitioners' argument, dealt explicitly with the example of an aircraft travelling to Dallas from a "non-service area state," the logic applies equally to aircraft travelling in the other direction. The Wright Amendment prohibits air carriers from pro-

viding through service from Love Field to airports outside the Love Field service area. Accordingly, an air passenger who chooses to travel from Love Field to such an airport must at some intermediate point part company with the aircraft boarded at Love Field. The intermediate point at which the aircraft and the passenger must part company in order to avoid violation of the Wright Amendment could be any other airport within Texas.[7] Thus, the Port Preference Clause is not violated by the Wright Amendment.

This interpretation of the effect of the Port Preference Clause does not strain logic, as Petitioners suggest (Pet. 17). The Port Preference Clause is violated only if a vessel is *obliged* to "enter, clear, or pay duties" in a state other than that to which or from which it is bound. An aircraft leaving from Love Field is not *obliged* by the Wright Amendment to land in a state other than Texas before it or its disembarked passengers may continue travel to states located outside the Love Field service area: it may land anywhere in Texas to discharge its passengers who may then fly directly to such states.

Furthermore, Petitioners' idiosyncratic definitions of the terms "enter," "clear" and "pay duties" are supported neither by authority nor good sense. The Court of Appeals was correct in attributing a technical meaning to these terms. *State of Kansas*, 16 F.3d at 440. (Pet. App. 7a.)

Moreover, and more fundamentally, the Wright Amendment does not require aircraft *generally* bound to or from Texas to enter, clear, or pay duties in another state. The Wright Amendment does not affect any aircraft other than those leaving from or arriving at Love Field.

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[7] It is clear from the language and syntax of the second sub-clause of the Port Preference Clause that the other state referred to therein is intended to be a third state other than those from which and to which the vessel is bound. In the above hypothetical, no state other than the departure and destination states is involved.

This trivial effect on interstate air transportation emanating from one airport in the Dallas-Fort Worth area, located a mere 12 miles from DFW Airport, can hardly be elevated rationally to the level of a violation of the Port Preference Clause.

III. THE WRIGHT AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT RIGHT OF FREE SPEECH

Petitioners contend that the Wright Amendment, as interpreted by the DOT, permits carriers to provide information about, and sell, transportation from Love Field to points other than Texas, New Mexico, Oklahoma, Arkansas, and Louisiana upon request, but prohibits the carriers (and travel agents) from advertising or offering such information and service absent request. This prohibition, Petitioners contend, violates the First Amendment because such advertising or offering is protected commercial speech.

A. The Wright Amendment's Restriction Does Not Affect Truthful Commercial Speech

Although the District Court and Court of Appeals in this case and in *Cramer* assumed that the Wright Amendment restricts the dissemination of truthful commercial speech that concerns a lawful activity, a precise analysis of the commercial speech restriction reveals that the statements restricted by the Amendment concern *unlawful* activity.

The Wright Amendment renders unlawful through service to or from Love Field and any point beyond its direct service area. Subsection (a) of the Amendment requires incorporation of this operating limitation into the operating permit of every air carrier. The Wright Amendment's restriction on commercial speech states that "no person shall . . . offer to provide" such unlawful through service. International Air Transportation Competition Act 1979, § 29(b). (Pet. App. 2a-3a.)

The unsolicited promotion of double ticketing falsely implies that the air carrier may lawfully provide through service. Commercial speech is not entitled to any First Amendment protection unless "it concerns a lawful activity and is not misleading or fraudulent." *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico.*, 478 U.S. 328, 340 (1986). Because Petitioners do not have a First Amendment right to make misleading statements that concern service prohibited by the Wright Amendment, the sales and solicitations rights that Petitioners seek are not "protected commercial speech."

B. Petitioners' Arguments Have Been Heard and Rejected in Prior Decisions

In *Cramer*, the Fifth Circuit applied a protected commercial speech analysis to the exact same speech restrictions at issue in this appeal. The Fifth Circuit held that speech regarding the sale of airline tickets to or from Love Field is "commercial speech" which, assuming that the speech is truthful and concerns a lawful activity, is entitled to some First Amendment protection. *Cramer*, 931 F.2d at 1033. *Cramer* found that the Wright Amendment's restrictions satisfied each prong of the test applicable to protected commercial speech: (1) that the government's interest in restricting this speech be substantial; (2) that the restrictions directly advance the government's interest; and (3) that the restrictions provide a reasonable fit in serving the interest. *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1505, 1510 (1993); *Cramer*, 931 F.2d at 1034-1035.

C. The Courts Below Properly Applied the *Central Hudson* Test

Like the Fifth Circuit in *Cramer*, the District Court and Court of Appeals applied the three-part *Central Hudson* test and determined that the Wright Amendment satisfies each prong of that test. *State of Kansas*, 797 F. Supp. at 1053, 1054. (Pet. App. 37a-38a.) Indeed, the Court

of Appeals concluded that the second and third prongs of the test are rather obviously satisfied in this case. *State of Kansas*, 16 F.3d at 442-443. (Pet. App. 13a.)

1. *The Wright Amendment Satisfies the Substantial Interest Criterion*

"The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 477 U.S. 557, 563 (1980). The Fifth Circuit in *Cramer*, the Court of Appeals and the District Court all concluded that the governmental interest served by the Wright Amendment is a "substantial" interest for purposes of the *Central Hudson* analysis:

> Congress had a substantial interest in resolving the dispute between Dallas and Fort Worth, *a controversy that had long hindered efforts to improve airline service for the Dallas-Fort Worth area.*

Cramer, 931 F.2d at 1034 (emphasis added). The Court of Appeals concluded that it was impossible to question the substantiality of the government's interest in the case, namely "ensuring adequate facilities for interstate air travel in the Dallas-Fort Worth area." *State of Kansas*, 16 F.3d at 443. (Pet. App. 15a.)

2. *The Wright Amendment Satisfies the Direct Advancement Criterion*

The Court of Appeals and the District Court held that the restrictions imposed by the Wright Amendment directly advance the government's interests: "The Wright Amendment directly advances the interest asserted by reducing demand for air travel from Love Field." *State of Kansas*, 797 F. Supp. at 1053. (Pet. App. 38a.) The Court of Appeals stated:

> The advertising ban advances the asserted governmental interest—to settle a regional dispute by pre-

> ferring DFW over Love Field—only too well in appellants' eyes: The restrictions reduce the demand for Love Field and thereby strengthen DFW.

State of Kansas, 16 F.3d at 443 (Pet. App. 13a.); *cf.*, *Posadas*, 478 U.S. at 341 (upholding ban that results in the "reduction of demand for casino gambling").

3. *The Wright Amendment Satisfies the Reasonable Fit Criterion*

The minor restrictions on commercial speech imposed by the Wright Amendment reasonably fit the government's interests. The restrictions do not impose a total ban on providing information regarding "double ticketing"; rather, the restrictions permit truthful responses to inquiries from travellers, and merely prevent air carriers or their agents from actively soliciting business that would serve to undermine the effect of the Wright Amendment. At the same time, the restrictions encourage many passengers to use DFW Airport rather than Love Field for long haul travel.

The Court of Appeals found a "reasonable fit" between the restrictions and the government's interests, recognizing that:

> A permissible regulation "employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.* The Department's interpretation of the statute, while prohibiting advertising of service between Love Field and points outside the service area, permits airlines and their travel agents to provide service schedules and prices (to facilitate "double-ticketing" arrangements) to customers who specifically ask for them. The advertising ban thus is narrowly tailored to be "in proportion to the interest served."

State of Kansas, 16 F.3d at 443, quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). (Pet. App. 13a-14a.) *See also State of Kansas*, 797 F. Supp. at 1053-1054. (Pet. App. 38a.)

4. *Petitioners Misconstrue the Reasonable Fit Criterion*

Petitioners betray a misunderstanding of what this Court requires by the "reasonable fit" test in complaining that the Court of Appeals erred in failing to consider the availability of alternative means of serving the government's interest. Contrary to Petitioners' contention, the availability of allegedly less intrusive means does not render the Wright Amendment's restrictions unconstitutional. *Board of Trustees*, 492 U.S. at 480. The *Board of Trustees* opinion does not hold that if a restriction that does not involve regulation of speech is available, a restriction of commercial speech is per se unconstitutional: "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.* (emphasis added).[8]

D. The Court of Appeals Correctly Refused to Apply Heightened Scrutiny to the Wright Amendment's Regulation of Commercial Speech

Petitioners' contention that the government must demonstrate that the Wright Amendment's regulation of commercial speech is necessary to promote a compelling governmental interest is erroneous. At most, the communications restricted by the Wright Amendment constitute ordinary commercial speech. No authority exists to support Petitioners' argument that restrictions on such speech

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[8] Petitioners contend that the government's interest in the Wright Amendment no longer exists. They support this argument by an improper and highly selective reference to a report which Petitioners have suggestively dubbed the "Secret Report." This report is *not* part of the evidentiary record in this case. The Court of Appeals denied Petitioners' request that it take judicial notice of the contents of the report and Petitioners have not challenged that denial. There is no justification for Petitioners to make reference to that report as if it were evidence in this case. Moreover, as the Respondents fully briefed in the court below, Petitioners' characterization of the report is inaccurate and misleading, and the report does not support Petitioners' constitutional claims.

warrant "heightened scrutiny." As this Court explained very recently in a commercial speech case: "We have rejected the 'least-restrictive means' test for judging restrictions on commercial speech." *City of Cincinnati*, 113 S. Ct. at 1510 n.13.

1. *The Wright Amendment's Commercial Speech Restrictions Do Not Curtail Constitutionally Protected Activity*

Given the availability of comprehensive airline service from DFW Airport, the use of Love Field as the terminus for interstate air travel is not a constitutionally protected right. Petitioners do not have a constitutional right to the most convenient form of travel, and minor travel restrictions do not even implicate the fundamental right of travel. *Cramer*, 931 F.2d at 1031; *City of Houston*, 679 F.2d at 1198; *State of Kansas*, 16 F.3d at 442 n.6. (Pet. App. 13.) ("We therefore need not depart from *Central Hudson* since the advertising restrictions do not impinge upon a constitutionally protected activity.")

Pursuant to its powers to regulate interstate commerce, Congress may lawfully impose regulations on interstate air travel from Love Field; indeed, Congress could prohibit *all* interstate travel from Love Field. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-40 (1937) (Congress empowered to regulate broadly any activity that affects interstate commerce). *A fortiori*, the government can restrict air carriers from advertising the availability of "connecting flights" at points located within the Love Field service area in order to reduce the demand for interstate travel at Love Field. Petitioners cite no authority for the proposition that such clearly authorized restrictions should be subject to strict scrutiny. In contrast, this Court in *Posadas* found that Puerto Rico *could* lawfully have imposed a complete ban on casino gambling. Accordingly, the Court opined, it could do the lesser act of restricting the advertisement of casino gambling. *Posadas*, 478 U.S. at 345.

2. Carey *and* Bigelow *Are Inapposite*

Carey and *Bigelow* are both cases in which the conduct in question involved fundamental rights that could not have been curtailed by the State.[9] *Carey* involved the decision whether or not to beget a child—"That decision holds a particularly important place in the history of the right of privacy." *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977). *Bigelow v. Virginia*, 421 U.S. 809 (1975) involved the fundamental right of residents of Virginia to choose whether to have an abortion. The State attempted to prohibit the advertisement within Virginia of the availability of abortion facilities in a neighboring state.

IV. THE WRIGHT AMENDMENT DOES NOT VIOLATE OR EVEN IMPLICATE THE CONSTITUTIONAL RIGHT TO TRAVEL

The right to travel is not a right that is found in any express term of the Constitution. However, Petitioners argue that the seemingly omnipresent nature of the right to travel justifies the application to the Wright Amendment of "heightened scrutiny" that this Court has adopted for resolving constitutional issues that relate to infringements of express provisions of the Constitution involving fundamental rights or suspect classifications. The District Court properly rejected Petitioners' contention, holding that because the "Wright Amendment operates only as an inconsequential impediment to the right to travel and does not implicate the fundamental right [to travel]." application of a "compelling interest" or heightened scrutiny analysis is inappropriate. *State of Kansas*, 797 F. Supp. at 1051-52. (Pet. App. 34a.)

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[9] Contrary to Petitioners' contention, neither *Carey* nor *Bigelow* implicitly applies a level of scrutiny higher than that applied to ordinary commercial speech: "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities which the State may legitimately regulate or prohibit." *Bigelow*, 421 U.S. at 825; *see also Carey*, 431 U.S. at 701.

The Court of Appeals was more emphatic: "In short, we think that the [Wright] Amendment's interference with interstate travel to and from Texas or, to and from the Dallas-Fort Worth area, or even air travel to and from Dallas alone is trivial." *State of Kansas*, 16 F.3d at 442. (Pet. App. 12a.)

A. The Wright Amendment Does Not Abridge the Fundamental Right of Interstate Travel

1. *Petitioners Do Not Have a Constitutional Right to the Most Convenient Form of Travel*

Petitioners do not have a constitutional right to the most convenient or the most economical form of travel. *State of Kansas*, 797 F. Supp. at 1051-52 (Pet. App. 34a-35a); *Cramer*, 931 F.2d at 1031; *City of Houston*, 679 F.2d at 1198 ("At most, their argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel. That notion, as any experienced traveler can attest, finds no support whatsoever in *Shapiro* [*v. Thompson*, 394 U.S. 618 (1969)] or in the airlines' own schedules.").

2. *Minor Travel Inconveniences Do Not Violate or Implicate the Fundamental Right to Travel*

The Wright Amendment does not prohibit, prevent, or even deter travel from any geographical location to another; it merely ensures that most long haul travellers use DFW Airport and provides safeguards against circumvention of this legislative allocation of air travel services. Yet, Petitioners claim that their fundamental right of interstate travel is unconstitutionally abridged by the Wright Amendment because *if* Petitioners voluntarily choose Love Field (instead of DFW Airport) as their departure or arrival airport for long haul travel, the Wright Amendment imposes heavy burdens. However, even Petitioners admit that these "burdens" imposed by the Wright Amendment are "not . . . onerous." (Appellants' Brief before the Court of Appeals, at 32).

The Court of Appeals stated, quoting Justice O'Connor in *Attorney-General of New York v. Soto-Lopez*, 476 U.S. 898 (1986):

> "[S]omething more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied." 476 U.S. at 921. We think in this case that appellants' claim does not reach that threshold, and the impact of the Wright Amendment on interstate travel—even air travel to and from the Dallas-Fort Worth area—is negligible.

State of Kansas, 16 F.3d at 442. (Pet. App. 11a.)

B. The Wright Amendment Does Not Create Impermissible Classes: It Does Not Violate the Fifth Amendment's Due Process Clause

Petitioners wrongly urge that this Court should apply a heightened Fifth Amendment Due Process/Equal Protection analysis to the Wright Amendment. Heightened scrutiny under the Equal Protection Clause is required only in the rare circumstance "where a law classifies by race, alienage, or national origin, and where a law classifies in such a way as to infringe constitutionally protected fundamental rights." *Attorney-General of New York*, 476 U.S. at 906-907, n.6. Clearly, the Wright Amendment makes no such classification.

The *Shapiro* case does not require compelling interest scrutiny of the Wright Amendment. Petitioners' citation from the opinion of Justice Stewart in that case (Pet. 25) is selective and inaccurate, suggesting that Justice Stewart intended his observations to apply to any statute that *in any way* impinges upon the constitutional right of interstate travel. What the learned Justice actually wrote was: "And it further follows, as the Court says, that any *other* purposes offered in support of a law *that so clearly impinges upon the constitutional right of interstate travel* must be shown to reflect a *compelling* governmental in-

terest." *Shapiro*, 394 U.S. at 643-644 (second emphasis added).

If Petitioners were correct, all perimeter rules which, like the Wright Amendment, restrict the ability of commercial passenger aircraft to travel directly to or from any point outside a certain area surrounding the restricted airport, would be unconstitutional. Of course, such perimeter restrictions have been upheld as constitutional on several occasions. *See. e.g., City of Houston*, 679 F.2d 1184 (5th Cir. 1982) (upholding the constitutionality of Washington National perimeter rule as not violative of either the fundamental right to travel or the Port Preference Clause). Although not analyzing whether the rule constituted a violation of the right to travel, the Second Circuit also upheld a perimeter rule for New York's La Guardia Airport despite the rule's requirement that passengers travelling a long distance use a less convenient airport. *Western Air Lines, Inc. v. Port Authority*, 817 F.2d 222 (2d Cir. 1987).

The Wright Amendment does not infringe fundamental rights, because Petitioners do not have a constitutional right to the most convenient form of travel. Compelling interest scrutiny under the Fifth Amendment's Due Process Clause is both unnecessary and improper; the Court of Appeals did not err in failing to require the National Government to demonstrate a compelling justification for the Wright Amendment.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 26, 1994

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 90-0606B(M)

WENDY ZAMUTT,

vs. *Plaintiff*,

SAMUEL K. SKINNER, UNITED STATES DEPARTMENT OF TRANSPORTATION, JOHN V. COLEMAN, OFFICE OF AVIATION ANALYSIS, and the UNITED STATES OF AMERICA,

Defendants.

ORDER

The above-captioned matter came on regularly for hearing on November 19, 1990, before the Honorable Rudi M. Brewster. David J. Gallo, Esq., appeared for Plaintiff Wendy Zamutt, and Michael E. Quinton, Esq., and Thomas Ray, Esq., appeared for Defendants, Samuel K. Skinner, United States Department of Transportation, John V. Coleman, Office of Aviation Analysis, and the United States of America.

Upon consideration of Plaintiff's Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment, and Defendants' Cross-Motion for Summary Judgment, and the arguments presented, it is hereby ordered:

1. Plaintiff's Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment, is hereby denied on the grounds that Plaintiff lacks standing to bring this lawsuit.

To satisfy the standing requirements, Plaintiff must establish that (1) she suffered some actual injury, (2) the

injury is fairly traceable to the alleged illegal conduct, and (3) the injury is likely to be redressed if Plaintiff's suit is successful.

The court finds the International Air Transportation Competition Act of 1979, P.L. 96-192, 94 Stat. 35, 48-49 (1980) (the "Love Field Amendment") does not deprive Plaintiff of her First Amendment right to hear or her fundamental right of interstate travel. Any economic injury Plaintiff may have suffered from the restrictions at Love Field are too speculative and do not satisfy the "actual injury" standing requirement.

The court also finds that there has been an insufficient showing that a ruling in her favor would redress the alleged economic injury she suffers. It is unclear that Plaintiff would get less expensive and more convenient airline service from San Diego, California, to Dallas, Texas, if the Love Field Amendment was repealed.

2. In the alternative, if Plaintiff does have standing, the Defendants' Cross-Motion for summary judgment is hereby granted. The court finds that the Love Field does not violate any of Plaintiff's constitutional rights, including the fundamental right to travel, the First Amendment, and the Port Preference Clause.

IT IS SO ORDERED.

DATED: Dec. 6, 1990

/s/ Rudi M. Brewster
United States District Judge

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Supreme Court, U.S.
FILED
AUG 26 1994
OFFICE OF THE CLERK

No. 93-2018

(3)

In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF KANSAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 48, restricts interstate airline service to and from Love Field in Dallas, Texas. The question presented is whether Section 29 violates the Port Preference Clause (Art. I, § 9, Cl. 6), petitioners' constitutional right to travel interstate, or the First Amendment.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 16 F.3d 436. The opinion of the district court (Pet. App. 17a-38a) is reported at 797 F. Supp. 1042.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1994. On April 15, 1994, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 18, 1994. The petition for a writ of certiorari was filed on June 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 48, is known as the "Love Field" or "Wright" Amendment. It was enacted to provide "a fair and equitable settlement for a dispute that ha[d] raged in the Dallas/Fort Worth [Texas] area for many years." H.R. Conf. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979). The dispute concerned whether Dallas or Forth Worth should have the principal airport for the metropolitan area that had grown up around the two cities. To resolve that dispute, the two cities agreed that all flights at Love Field and other airports in the area would be moved to a new airport, Dallas-Fort Worth International Airport (DFW). Pet. App. 3a; see also *Cramer* v. *Skinner*, 931 F.2d 1020, 1023 (5th Cir.), cert. denied, 112 S. Ct. 298 (1991). The cities' agreement was threatened, however, by the successful refusal of Southwest Airlines to terminate its operations at Love Field. The Love Field Amendment was designed to ensure the economic viability of DFW by limiting interstate operations at Love Field. Pet. App. 3a-4a.

The Amendment generally prohibits airlines from offering single ticket interstate service between Love Field and any place in a State other than Texas and its four bordering States (Louisiana, Arkansas, Oklahoma, and New Mexico), which are known collectively as the Love Field Service Area. § 29, 94 Stat. 48.[1] Passengers

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[1] The Amendment permits unrestricted interstate travel to and from Love Field to be provided by a limited number of charter air flights and by commuter aircraft with a passenger capacity of fewer than 57 passengers. In addition, it permits persons who provided service from Love Field on November 1, 1979, to con-

may travel between Love Field and points outside the Love Field Service Area, however, if they first fly from Love Field to a State in the Service Area, and then take a second flight to their destination. To do so, such travellers must buy separate tickets for each leg of their journey, and they cannot check their baggage through for the entire trip. Pet. App. 4a; *Love Field Amendment Proceeding*, DOT Order No. 85-12-81 (Dec. 31, 1985), petition for review denied *sub nom. Continental Air Lines, Inc.* v. *Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988). Passengers may also obtain unrestricted interstate airline service at DFW, which is located 18 miles from Dallas and only 12 miles from Love Field. *Cramer*, 931 F.2d at 1023.

As construed by the Department of Transportation, the Love Field Amendment prohibits airlines and their agents from advertising or volunteering information about scheduled interstate services offered with large aircraft between Love Field and points outside the Love Field Service Area. § 29(b), 94 Stat. 48; *Love Field Amendment Proceeding*, DOT Order No. 85-12-81 (Dec. 31, 1985). Airlines and their agents may provide that information, however, if a passenger requests it.

2. Petitioners are the State of Kansas, the Wichita Airport Authority, a Kansas travel agency, and several individuals claiming that the Love Field Amendment interferes with their travel plans. Pet. App. 5a. They filed this action in the United States District Court for the District of Columbia seeking declaratory and equitable relief against those responsible for enforcing

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tinue to provide service to the same points as were served on that date. § 29(a) and (b), 94 Stat. 48.

the Love Field Amendment. Pet. App. 6 n.6.[2] They claimed that the Amendment violates the Port Preference Clause (Art. I, § 9, Cl. 6), their right to travel interstate, and the First Amendment. See Pet. 6. On cross-motions for summary judgment, the district court rejected those claims. Pet. App. 17a-38a.

3. The court of appeals affirmed. Pet. App. 6a-15a.[3] It rejected petitioners' constitutional claims, and it noted that those claims had also been rejected in "[a] virtually identical lawsuit" brought in the Fifth Circuit by the same counsel who represents petitioners. *Id.* at 5a, citing *Cramer* v. *Skinner*, *supra*.

ARGUMENT

The District of Columbia Circuit correctly rejected petitioners' constitutional challenges to the Love Field Amendment. Moreover, its decision is consistent with the Fifth Circuit's decision in *Cramer* v. *Skinner*, *supra*, which rejected identical challenges. This Court denied further review in *Cramer* v. *Skinner*, 112 S. Ct. 298 (1991), and there is no reason for a different disposition here.

1. Contrary to petitioners' contention (Pet. 9-17), the court of appeals correctly concluded (Pet. App. 6a-9a) that the Love Field Amendment does not violate the Port

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[2] The complaint named the United States, the Department of Transportation, the Secretary of Transportation, the Department's Office of Aviation Analysis, and the Director of the Office of Aviation Analysis as defendants. Respondents American Airlines and Dallas-Fort Worth International Airport Board intervened as defendants in the district court.

[3] The court of appeals first held that "at least some of the individual [petitioners] have standing to raise all [three] of the [constitutional] challenges." Pet. App. 5a.

Preference Clause. That Clause states: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." U.S. Const. Art. I, § 9, Cl. 6.

As the court of appeals held, the Love Field Amendment does not violate the first part of the Port Preference Clause. As the court explained, the "obvious purpose and the primary impact" of the Amendment is not to favor a port in one State over a port in another State. Pet. App. 9a; accord *Cramer*, 931 F.2d at 1032 n.14. Instead, the primary purpose and effect of the Amendment is to favor one airport in Texas (DFW) over another airport in Texas (Love Field). See Pet. App. 8a. As the court of appeals stated, "[s]uch a preference is of no concern to the Port Preference Clause[,] which is designed to protect states, not individual ports." *Ibid.*

Petitioners contend that the Love Field Amendment impermissibly favors airports in the Love Field Service Area over airports outside the Service Area. The court of appeals recognized that airports in the Service Area might have a "rather insignificant" preference over airports outside the Service Area with respect to "travelers bound to [or from] Dallas," because airports in the Service Area, unlike those outside the Service Area, may provide direct service to Love Field, which is somewhat closer to Dallas than DFW is. Pet. App. 8a. But the court correctly concluded that such "incidental advantages" do not violate the Port Preference Clause. Pet. App. 9a (quoting *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1856), and citing *Alabama Great Southern R.R.* v. *United States*, 340 U.S. 216, 229 (1951), and *Louisiana Public*

Serv. Comm'n v. *Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931)); accord *Cramer*, 931 F.2d at 1032.

The court of appeals was also correct in holding that the Love Field Amendment does not violate the second part of the Port Preference Clause, which provides that "Vessels bound to, or from, one State" shall not "be obliged to enter, clear, or pay Duties in another [State]." U.S. Const. Art. I, § 9, Cl. 6. Airplanes traveling to or from Texas are not required by the Amendment to pass through any particular port in the Service Area, as long as they are traveling to or from some point in Texas other than Love Field. Therefore, as the court of appeals determined, the second part of the Port Preference Clause "do[es] not literally cover" the Love Field Amendment. Pet. App. 8a; see also *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) at 435 (Port Preference Clause does not prevent the government from designating ports of entry, so long as there is no "discrimination between States").[4]

2. Petitioners also contend that the Love Field Amendment violates the right to travel interstate. Pet. 23-27. That right protects interstate travelers from "'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers." *Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753, 763 (1993) (quoting *Zobel* v. *Williams*, 457 U.S. 55, 60

[4] Moreover, as the government argued in the court of appeals, the Love Field Amendment does not implicate the second part of the Port Preference Clause because the Amendment applies only to the transportation of passengers (and not goods), whereas the Clause applies to vessels with goods that are required to "enter" through and "clear" customs. The court of appeals observed that that argument is "probably correct," but found it unnecessary to resolve. Pet. App. 7a.

n.6 (1982)). Petitioners appear to argue (Pet. 25-26) that the Love Field Amendment implicates both protections because (1) it burdens interstate travel to and from Texas; and (2) it treats interstate passengers bound to or from Love Field differently from interstate passengers bound to or from other points in Texas. Neither argument is substantial.

The court of appeals correctly held that the Love Field Amendment does not have either the purpose or the effect of burdening interstate travel to and from Texas. Pet. App. 9a-12a. Indeed, as the court observed, "the whole purpose of the Amendment was to encourage interstate air travel to and from the Dallas-Fort Worth area, by channelling it through the newly built DFW airport." *Id.* at 11a. The court recognized that it is possible, "at least theoretically, [that] there exist some putative Dallas passengers who forego interstate air travel to or from points outside the Service Area because the [Love Field] Amendment makes it burdensome to fly into Love Field and the alternative, DFW, is a longer drive." *Id.* at 12a. The court properly concluded, however, that any such theoretical impact is too "negligible" and "trivial" to amount to an unconstitutional burden on interstate travel. *Id.* at 11a, 12a; see *City of Houston* v. *FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982) (rejecting right-to-travel argument that "reduce[d] to the feeble claim that passengers have a constitutional right to the most convenient form of travel").

Moreover, the Love Field Amendment is readily distinguishable from statutes that this Court has held discriminate in a manner that violates the right to interstate travel. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), involved a one-year waiting period for new state residents seeking welfare assistance; *Attorney General*

v. *Soto-Lopez*, 476 U.S. 898 (1986), involved an employment preference that was available only to job applicants who had been New York residents when they joined the military. In contrast, the Love Field Amendment does not distinguish between new residents and longtime residents, or between residents and non-residents. Instead, it distinguishes between two classes of interstate travelers, and does so only to the extent of influencing their choice between two nearby airports in the same State.

3. As noted above, the Department of Transportation has construed the Love Field Amendment to prohibit the advertising of air service between Love Field and points outside the Love Field Service Area. See p. 3, *supra*. Petitioners argue (Pet. 17-23) that this advertising restriction violates the First Amendment. The court of appeals correctly rejected that argument. Pet. App. 12a-15a.

As an initial matter, the court of appeals properly reviewed the Love Field advertising restriction under the four-part test articulated in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). See Pet. App. 13a. Petitioners, however, renew (Pet. 17-19) their argument that the restriction is subject to a more stringent standard of review because it concerns the right to travel interstate. The court of appeals correctly decided that it "need not depart from *Central Hudson* since the advertising restrictions do not impinge on [the right to travel interstate]." Pet. App. 13a n.6. Moreover, this Court has made clear that heightened scrutiny of a commercial speech restriction is appropriate only when the underlying activity "could not have been prohibited by the State." *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 345

(1986). Because Congress could have prohibited all interstate service to Love Field (see Pet. App. 15a) or even closed the field altogether, heightened scrutiny is not appropriate here.

The court of appeals also correctly held that the Love Field advertising restriction satisfies the *Central Hudson* test. Under that test, a restriction on commercial speech must directly advance a substantial governmental interest in a manner that is narrowly tailored to serve that interest. See *Central Hudson*, 447 U.S. at 566; see also *Ibanez* v. *Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2088-2089 (1994); *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993); *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1798 (1993); *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993); *Board of Trustees* v. *Fox*, 492 U.S. 469, 475 (1989).

First, the Love Field advertising restriction furthers a substantial governmental interest. As noted above (p. 2, *supra*), the Love Field Amendment as a whole was enacted to resolve the longstanding dispute over the location of the Dallas-Fort Worth area's principal airport, a dispute "that had long hindered efforts to improve airline service for * * * [that] area." *Cramer*, 931 F.2d at 1034. The Amendment ensures the economic viability of DFW—the airport that the two cities agreed would serve as the principal airport for the area (see Pet. App. 3a)—by channeling interstate flights to DFW. As the court of appeals recognized, it is "impossible to question" the substantiality of the federal government's interest in enhancing interstate travel to a large metropolitan area, especially in a manner that facilitates an agreement between the affected munici-palities. *Id.* at

15a (citing *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)).

Moreover, the Love Field advertising restriction furthers the governmental interest in a direct and material way. This Court has recognized as a matter of common sense that a restriction on the advertising of a service limits demand for the service. *Edge Broadcasting*, 113 S. Ct. at 2707; *Posadas*, 478 U.S. at 342; *Central Hudson*, 447 U.S. at 569. That recognition fully applies to the Love Field restriction, which limits demand for a service—*i.e.*, airline service between Love Field and points outside the Service Area—by limiting advertising of the service.[5]

Finally, the Love Field advertising restriction is narrowly tailored to achieve its purpose. See *Fox*, 492 U.S. at 480. It does not prohibit the advertising of *all* interstate air service to and from Love Field, but only of service between Love Field and points outside the Service Area. Moreover, it does not prevent passengers

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[5] Petitioners cite a Department of Transportation study as evidence that the governmental interest underlying the Love Field advertising restriction "has admittedly terminated," and that the restriction no longer materially advances that interest. Pet. 21-22. Petitioners' reliance on the study is misplaced. The Love Field Amendment embodies a judgment by Congress regarding the existence of a governmental interest. It is for Congress, not the courts, to determine whether the governmental interest underlying a statute has terminated. Congress also is in the best position to determine whether changed circumstances warrant amendment or repeal of such legislation, see *Turner Broadcasting Sys., Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994), after taking into account materials furnished by the Executive Branch and others. As petitioners acknowledge, Congress has repeatedly declined to enact proposed legislation that would repeal or modify the Love Field Amendment. Pet. 21.

from obtaining information about air service between Love Field and points outside the Service Area. The airlines may provide such information when passengers ask for it. Pet. App. 14a. Thus, the advertising restriction is "in proportion to the interest served." *Fox*, 492 U.S. at 480 (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)); cf. *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 458 (1978) (attorney disciplinary rule before the Court "does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice").[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1994

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[6] Petitioners contend (Pet. 23) that the court of appeals erred by failing to consider unspecified "alternative means" of advancing the governmental interest underlying the Love Field advertising restriction. This Court has squarely held, however, that the *Central Hudson* test does not require a "least restrictive means" analysis. *Fox*, 492 U.S. at 473-481.

(4)

Supreme Court, U.S.
FILED
AUG 26 1994
OFFICE OF THE CLERK

No. 93-2018

In The

Supreme Court of the United States

October Term, 1994

STATE OF KANSAS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "Love Field Amendment" (Section 29, Pub. L. No. 96-192, 94 Stat. 35 (1980)) violates the Ports Preference Clause (U.S. Const. art. 1, § 9, cl. 6) of the Constitution.

2. Whether the "Love Field Amendment" impermissibly abridges the right to interstate travel.

3. Whether the restrictions on advertising in the "Love Field Amendment" violate the First Amendment.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Respondent Dallas-Fort Worth International Airport Board states that it has no corporate parent, subsidiaries, or affiliates, other than the creating municipalities of Dallas and Fort Worth, Texas.

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No. 93-2018

In The

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October Term, 1994

STATE OF KANSAS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR RESPONDENT DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD IN OPPOSITION

STATEMENT OF THE CASE

For years, the cities of Dallas and Fort Worth, Texas operated separate airports (Love Field and Redbird in Dallas, Greater Southwest International and Meacham Field in Fort Worth) in fierce competition with each other. This competition to a large degree prevented the cities from agreeing on where to build a new, regional airport, despite the fact that both cities recognized that such an airport was necessary for the continued growth of the region. *See City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. 1015, 1019 (N.D. Tex. 1973) (summarizing the history of the dispute), *aff'd*, 494 F.2d

773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974). This rivalry "resulted in unnecessary expense to the carriers as well as the taxpayers and inadequate and incomplete air service to both cities." *Id.* at 1020.

The cities resolved this dispute in the late 1960's by agreeing to jointly fund, through the issuance of approximately $1 billion in bonds, the new Dallas-Fort Worth International Airport ("DFW Airport") and to close their respective existing airports. In this way, all commercial passenger traffic could be directed to a single, regional airport that would best serve the air transportation needs of *both* cities and the region. A site for what was to become DFW Airport was selected midway between Dallas and Fort Worth, approximately 12 miles from Love Field and 18 miles from downtown Dallas. *See Cramer v. Skinner*, 931 F.2d 1020, 1023 (5th Cir.), *cert. denied*, 112 S. Ct. 298 (1991). DFW Airport opened for commercial operation in 1974. All of the airlines serving those airports, except Southwest Airlines, agreed to transfer their operations to DFW Airport. *Id.* Southwest Airlines, which at the time was a wholly intrastate carrier licensed by Texas to operate at Love Field, prevented full implementation of this compromise by securing judicial recognition of its right to continue intrastate operations at Love Field. *Southwest Airlines*, 371 F. Supp. at 1019 (rejecting the request by the cities and regional airport board for a declaratory judgment stating that they could exclude Southwest Airlines from operating at Love Field).

In the wake of airline deregulation, Southwest Airlines expressed its intention to begin interstate air passenger service from Love Field. *Cramer*, 931 F.2d at 1023.

Therefore, in order to preserve the agreement between Dallas and Fort Worth concerning the establishment of DFW Airport and to foster the central role of DFW Airport in the development of the region's air transportation resources, Congress enacted Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 48 (1980) (the "Love Field Amendment"). *See* H.R. Conf. Rep. No. 716, 96th Cong., 2d Sess. at 24, *reprinted in* 1980 U.S.C.C.A.N. 78, 86. The Love Field Amendment and Department of Transportation Order 85-12-81 (Dec. 31, 1985) (the "DOT Order") interpreting the Love Field Amendment achieve this goal by imposing certain restrictions on long-haul interstate passenger operations at Love Field in order to preserve DFW's status as the primary interstate passenger airport for the Dallas-Fort Worth region.[1]

The most important of these restrictions limits direct interstate flights from Love Field to "turn-around service between Love Field and points in the four contiguous states." *Id.* (Hereinafter, the four contiguous states, Louisiana, Arkansas, Oklahoma and New Mexico, shall be referred to as the "Love Field Service Area.").[2] The Love

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[1] The D.C. Circuit previously approved the Department of Transportation's interpretation of the Love Field Amendment, finding it compatible with Congress' purpose "to limit that airport's operations to 'short-haul' service." *Continental Airlines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1453 (D.C. Cir. 1988).

[2] Subsection (a) of the Love Field Amendment permits a certain number of charter flights and unlimited commuter (fewer than 56 passenger) airplane operations. *See* Conference Report at 25, 1980 U.S.C.C.A.N. at 86-87.

Field Amendment places no restrictions on Love Field flights to and from points within Texas. Pursuant to the DOT Order, passengers may travel between Love Field and points beyond the Love Field Service Area by taking two flights: one flight to an airport in the Love Field Service Area and a second flight to any point beyond the Love Field Service Area. Such travelers must purchase a separate ticket for each leg of the journey ("double ticketing") and cannot check their baggage through from Love Field to their final destination. Of course, any traveler to and from the Dallas-Fort Worth region may obtain unrestricted interstate airline services to or from any other state by flying through DFW Airport, located 12 miles from Love Field.

The Love Field Amendment, as construed by the Department of Transportation, also preserves the allocation of long-haul service to DFW Airport and short-haul service to Love Field by prohibiting airlines and travel agents from affirmatively advertising the availability through double-ticketing of connecting service to points beyond the Love Field Service Area. Airlines and travel agents may, however, provide such information in response to questions from travelers. Moreover, only airlines and travel agents are so restricted; others are free to publicize the availability of long-haul interstate travel to and from Love Field.

Petitioners include a number of individuals who would prefer to fly to and from Love Field without the inconveniences imposed by the Love Field Amendment, as well as the Central Travel Agency, the Wichita Airport Authority, and the State of Kansas, which maintains that its employees are inconvenienced by their inability to fly

directly to Love Field from Kansas. Petitioners challenge the constitutionality of the Love Field Amendment on three grounds: (1) that it violates the Ports Preference Clause; (2) that it violates their right of travel; and, (3) that it violates the First Amendment. Both the district court and the court of appeals upheld the constitutionality of the Love Field Amendment on all three grounds. *Kansas v. United States*, 797 F. Supp. 1042 (D.D.C. 1992) (Appendix to Petition ("App.") at 17a), *aff'd*, 16 F.3d 436 (D.C. Cir. 1994) (App. at 1a).

REASONS FOR DENYING THE WRIT

I. THE COURT HAS PREVIOUSLY REFUSED TO REVIEW THE PRECISE QUESTIONS PRESENTED HERE, AND PETITIONERS MAKE NO NEW ARGUMENTS TO JUSTIFY REVIEW IN THIS COURT

Twice before this Court has been asked to issue a petition for a writ of certiorari to review the identical questions presented here, and twice before this Court has declined to issue the writ. *Cramer v. Skinner*, 112 S. Ct. 298 (1991); *Cramer v. Pena*, 113 S. Ct. 2994 (1993). Petitioners raise no arguments here that were not raised in *Cramer*. Moreover, no subsequent decision of this Court, or of any court of appeals, district court, or state court casts doubt on the correctness of the underlying decision or suggests that this case is any more worthy of review than was *Cramer*.

To the contrary, the decision of the court of appeals (and of the district court) below addressed the identical

issues raised in *Cramer* and came to the identical conclusions. Thus this case comes to the Court with complete unanimity among every court that has addressed the questions presented here.[3]

Furthermore, this case presents no issue of national concern. The Love Field Amendment is a unique and narrow piece of legislation designed to resolve a regional dispute that had created in the Dallas-Fort Worth metropolitan area a bottleneck in the nation's interstate air transportation network. The restrictions of the Love Field Amendment affect only a small class of travelers who choose, for reasons of personal convenience, to use Love Field rather than DFW Airport, located just twelve miles away. Quite simply, there is no more reason now to review these issues than there was with respect to either petition in *Cramer*, and the Court should deny this petition as it denied the earlier petitions.[4]

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[3] The United States District Court for the Southern District of California, prior to the *Cramer* decisions, also found that the Love Field Amendment does not violate the First Amendment, the right to travel or the Ports Preference Clause. *Zamutt v. Skinner*, No. 90-0602-B(M), 1990 WL 430756 (S.D. Cal. Dec. 7, 1990) (alternative holding). The plaintiffs in *Zamutt*, in *Cramer*, and in this case were all represented by the same counsel.

[4] Petitioners also suggest that the Court should issue the writ in this case out of deference to Petitioner the State of Kansas because Kansas could have invoked this Court's original jurisdiction over suits between the states and the United States. Petition ("Pet.") at 9. Such jurisdiction is not, however, exclusive. 28 U.S.C. § 1251(b)(2) (1988). Having elected to bring its suit in the district court, Kansas cannot invoke the original jurisdiction it waived in order to make this case appear worthy of certiorari.

In any event, the fact that the State of Kansas is one of the Petitioners does not confer any special status on this case. Kansas

II. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED LAW IN DETERMINING THAT THE LOVE FIELD AMENDMENT IS CONSTITUTIONAL

A. THE LOVE FIELD AMENDMENT DOES NOT VIOLATE THE PORTS PREFERENCE CLAUSE

The Ports Preference Clause, U.S. Const. art. 1, § 9, cl. 6, is an express but limited restriction on Congress' power to regulate interstate commerce. It was adopted at the urging of the Maryland delegation to the Constitutional Convention to prevent Congress from designating Norfolk as the port of entry for all shipping entering the Chesapeake Bay, thus diverting maritime commerce away from Baltimore and other Maryland ports. 3 *Federal Convention Records*, App. A, Cl. v. III. The Ports Preference Clause consists of two subclauses, the so-called "Preferential Regulation Subclause" and the so-called "Enter or Clear Subclause." Petitioners maintain that the Love Field Amendment violates each of these subclauses. As the D.C. Circuit in this case and the Fifth Circuit in *Cramer* properly held, however, the Love Field Amendment does not violate either subclause of the Ports Preference Clause.

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does not raise any complaints based on federalism concerns or on its status as a state. It complains that the Love Field Amendment somehow makes it less convenient for its employees to fly to Dallas, Texas. *Kansas*, 16 F.3d at 439 (Pet. at 5a). Kansas' position in this case is no different from any employer whose employees fly; consequently, Kansas' Petition should not receive special consideration because Kansas happens to be a state.

First, the Love Field Amendment does not confer a "Preference" on Texas and the four states in the Love Field Service Area over the other 45 states in violation of the Ports Preference Clause. The Love Field Amendment simply expresses a preference for one Dallas-Fort Worth region airport, DFW Airport, over another Dallas-Fort Worth region airport, Love Field, with respect to long-haul passenger flights. It has long been settled law that the Ports Preference Clause does not prohibit legislation benefiting one port in one state even when such legislation "may incidentally operate to the prejudice of the ports in a neighboring state . . . . " *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433 (1856) (Construction of bridge over Ohio River that discouraged river traffic from using Wheeling, West Virginia and favored Pittsburgh, Pennsylvania did not violate the Ports Preference Clause.). *See also South Carolina v. Georgia*, 93 U.S. (3 Otto) 4, 12-13 (1876) (Improvements to Savannah harbor did not violate the Ports Preference Clause because such improvements helped Georgia's ports and hurt South Carolina's ports.); *Alabama Great S.R.R. v. United States*, 340 U.S. 216, 229 (1951) (Ports Preference Clause "does not forbid such discriminations as between ports.").

Any minimal detriment that results from the Love Field Amendment relates to specific airports (Love Field v. DFW Airport) within one region of one state, not to different states. Congress did not enact this legislation in order to benefit Oklahoma, for example, at the expense of Kansas, nor was there any intent to harm the competitive advantage of any state. Contrary to Petitioners' argument, this lack of animus is relevant to determine

whether the effects of the Love Field Amendment embody an actual preference for the ports in one state or whether any such effects are merely incidental to the real purpose of the Love Field Amendment. Because the language and history of the Love Field Amendment plainly evidence a preference for DFW Airport over Love Field, and not a preference for any state or states, the court of appeals properly found that the Love Field Amendment does not violate the so-called Preferential Regulation Subclause of the Ports Preference Clause. *Kansas*, 16 F.3d at 640-41 (App. at 8a-9a). *See also Cramer*, 931 F.2d at 1032 (same); *City of Houston v. Federal Aviation Admin.*, 679 F.2d 1184, 1198 (5th Cir. 1982) (upholding 1000-mile perimeter rule at Washington National Airport because no intent to discriminate against states beyond perimeter).[5]

Second, Petitioners argue that the Love Field Amendment violates the so-called "Enter or Clear Sub-Clause" of the Ports Preference Clause. This argument is unavailing because nothing in the Love Field Amendment requires "Vessels bound to, or from, one state . . . to enter, clear or pay Duties in another." Airplanes are free in general to fly to or from Texas to or from any other state

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[5] As the court of appeals noted, any detrimental effect from the Love Field Amendment on the airports of the 45 states beyond Texas and the Love Field Service Area is limited to the fact that passengers from those states must travel approximately 13 additional miles to get to downtown Dallas from DFW Airport as compared to Love Field if they want single-ticket service to Dallas. *Kansas*, 16 F.3d at 440-41 (App. at 8a-9a). The court of appeals was correct in concluding that this "rather insignificant" preference did not rise to constitutional proportions. *Id.*

without being "obliged" to first stop in another state. *Kansas*, 16 F.3d at 440 (App. at 7a). Moreover, the words "enter" and "clear" have precise, technical meaning relating to customs, and cannot be used broadly, as Petitioners urge, to mean simple arrival and departure. "Enter" means "to deposit a ship's papers at the custom in order to obtain license to land goods." Rene de Kerchove, *International Maritime Dictionary* at 262 (2d ed. 1961). Similarly, "clear" or "clearance" means "the act of clearing a ship entered at the customhouse." *Id.* at 150. *See also Harrison v. Vose*, 50 U.S. (9 How.) 372, 380-81 (1850) ("Yet such a clearance cannot be produced unless the vessel has first entered at the custom-house."); *United States v. Sullivan*, 26 F.2d 606, 608 (5th Cir. 1928) ("A vessel does not make entry by arriving at a port."). As the court of appeals noted, this limited meaning is consistent with the historical purpose of the Ports Preference Clause to prevent Norfolk from becoming the sole port of entry for all shipping entering the Chesapeake Bay. *Kansas*, 16 F.3d at 440 (App. at 7a).

B. THE LOVE FIELD AMENDMENT DOES NOT IMPLICATE PETITIONERS' CONSTITUTIONAL RIGHT TO TRAVEL

The right to travel does not include within its ambit every aspect of interstate travel. A law only implicates the right to travel when: (1) it actually deters all such travel, (2) its primary objective is to impede travel, or (3) it uses any classification that serves to penalize exercise of the right to travel. *Attorney General v. Soto-Lopez*, 476 U.S. 898, 903 (1986). As the court of appeals correctly

determined, the Love Field Amendment does none of these things.

First, the Love Field Amendment obviously does not deter *all* travel to and from Dallas, Texas. The deterrent effect reduces to, at most, the prospect of an additional thirteen miles of travel in order to enjoy single-ticket service to Dallas from certain locations. Even if the Love Field Amendment does deter some travel to and from Love Field, it does not deter travel to and from Dallas-Fort Worth via DFW Airport, nor does it deter travel to the region by any other means, such as car, bus or train. In any event, Petitioners' argument that any deterrent effects of the Love Field Amendment rise to constitutional proportions simply cannot be sustained.

Under Petitioners' rule, tolls on interstate highways and bridges would implicate Petitioners' sweeping right to travel doctrine. Neither logic nor any decision of this Court supports Petitioners' position. *See Soto-Lopez*, 476 U.S. at 921 (O'Connor, J. dissenting) (Plurality "implicitly recognize[d] . . . that something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied."). As the court of appeals observed, complaints about regulations of "negligible" and "trivial" impact, including those of Petitioners, simply are not of constitutional significance. 16 F.3d at 442 (App. at 11a-12a). *See also City of Houston*, 679 F.2d at 1198 ("At most, their argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel. That notion, as any experienced traveler can attest, finds no support whatsoever in *Shapiro* or in the airlines' own schedules.").

Second, impeding travel is plainly not the purpose of the Love Field Amendment; its purpose is to "encourage interstate air travel to and from the Dallas-Fort Worth area, by channelling it through the newly built DFW Airport." *Kansas*, 16 F.3d at 441 (App. at 11a). *See also Cramer*, 931 F.2d at 1031 (same).

Finally, the Love Field Amendment does not use any classification that serves to penalize exercise of the right to travel. It merely places certain restrictions on those interstate travelers who choose to use Love Field rather than DFW Airport located just 12 miles away. In addition to being minor inconveniences, these restrictions are a far cry from the blanket denial of important governmental benefits and individual rights at stake in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and the other cases relied upon by Petitioners, which have involved the denial of important rights and benefits to those migrating from one state to another.[6]

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[6] Even assuming the Love Field Amendment implicates the right to travel, Petitioners' argument that *Shapiro* mandates application of a compelling state interest test is incorrect. As this Court's decision in *Sosna v. Iowa*, 419 U.S. 393, 410 (1975), makes clear, where "the gravamen of [the] claim is not total deprivation . . . , but only delay" a rational basis analysis is appropriate. *See also Hawaii Boating Ass'n v. Water Transp. Facilities Div.*, 651 F.2d 661, 665-66 (9th Cir. 1981) ("Since [the failure to provide a berth in the recreational boat harbor at the same rate as a resident] does not involve a 'penalty' on the right to travel or a suspect class, the legislative classification must be tested by the rational basis standard."). The Love Field Amendment plainly survives such analysis.

C. THE LOVE FIELD AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT

Because the speech at issue here is purely commercial, the court of appeals was correct in analyzing the constitutionality of the Love Field Amendment under the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), as developed by *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986) and *Board of Trustees of State University v. Fox*, 492 U.S. 469 (1989). Under this test, a court reviewing a restriction on commercial speech must first determine whether the governmental interest asserted as a justification for regulating speech is "substantial." *Fox*, 492 U.S. at 475 (quoting *Central Hudson*, 447 U.S. at 566). If the interest is substantial, the court must then " 'determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.' " *Id.* (quoting *Central Hudson*, 447 U.S. at 566). The court of appeals correctly determined that the Love Field Amendment satisfied this test.

First, as the court of appeals held, the government's interest in the Love Field Amendment is substantial. Congress enacted the Love Field Amendment in order to ensure "adequate facilities for interstate air travel in the Dallas-Fort Worth area." *Kansas*, 16 F.3d at 443 (App. at 15a). *See also Cramer*, 931 F.2d at 1034 ("We conclude that Congress had a substantial interest in resolving the dispute between Dallas and Fort Worth, a controversy that had long hindered efforts to improve airline service for the Dallas-Fort Worth area."); *Kansas*, 797 F. Supp. at 1053

(App. at 37a) (same). This is plainly a substantial governmental interest, particularly in light of the unique and exclusive federal role in regulating interstate air travel recognized by this Court and by the lower courts. *See Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) ("Federal control [of air travel] is intensive and exclusive."); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-34 (1973) (same); *British Airways Bd. v. Port Auth.*, 558 F.2d 75, 83 (2d Cir. 1977) ("[L]egitimate concern for safe and efficient air transportation requires that exclusive control of airspace management be concentrated at the national level.").

Rather than argue that this is not a substantial interest, Petitioners argue that *Posadas* requires an inquiry into the specific interest in regulating speech rather than an inquiry into the governmental interest in the legislation's broader purposes. Pet. at 19. This view is mistaken. For example, in *Posadas* this Court examined the government's interest in regulating gambling, not just its interest in regulating *advertising* of gambling. In any event, the government's interest here in restricting advertising for the very activity it seeks to restrict, long-haul passenger flights to and from Love Field, is plainly coextensive with its interest in the legislation as a whole.[7]

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[7] Petitioners argue, without citation and relying only on what they pejoratively call the "Secret Report," that even if the governmental interest here was substantial, it no longer is and therefore the restrictions have become unconstitutional. This argument is without foundation. First, the so-called "Secret Report" is not in the record in this case, the court of appeals having refused to take judicial notice of it. Second, any changed

Second, the court of appeals properly found that the restrictions on the advertising of long-haul, interstate passenger flights to and from Love Field directly advance the substantial governmental interests in the Love Field Amendment. This Court has repeatedly held, and Petitioners concede, Pet. at 22, that a statute restricting commercial speech in order to reduce demand for something the government has restricted satisfies the "direct advancement" prong of the *Central Hudson* test. *Central Hudson*, 447 U.S. at 557 (holding that restrictions on advertising for electricity would reduce the demand for electricity and therefore directly advance government's interest in reducing consumption of electricity); *Posadas*, 478 U.S. at 341-42 (holding that restrictions on advertising for casino gambling to residents of Puerto Rico directly advanced government's interest in reducing casino gambling by residents). This logic properly formed the basis for the court of appeals' decision in this case. *Kansas*, 16 F.3d at 443 (App. at 13a). *See also Cramer*, 931 F.2d at 1034; *Kansas*, 797 F. Supp. at 1053 (App. at 38a).

Third, the Love Field Amendment's restrictions on commercial speech are "no more broad or no more expansive than 'necessary' to serve its substantial interests." *Fox*, 492 U.S. at 476. The court of appeals correctly applied this test, noting that the Love Field Amendment permits airlines and travel agents to answer consumers' questions about connecting flights beyond the Love Field Service Area and is thus "tailored to be 'in proportion to

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circumstances in interstate travel in the Dallas-Fort Worth area are the proper subjects for legislative consideration, not for judicial review.

the interest served.' "[8] 16 F.3d at 443 (App. at 13a-14a) (quoting *Fox*). *See also Cramer*, 931 F.2d at 1034 (same); *Kansas*, 797 F. Supp. at 1054 (App. at 38a) (same).

Petitioners argue only that the court of appeals erred by not considering less intrusive alternatives to the restrictions on advertising. Pet. at 23. This argument is foreclosed by this Court's clear holding in *Fox* that the "reasonable fit" test does not require the regulation to be "absolutely the least severe that will achieve the desired end." *Fox*, 492 U.S. at 480. *See also City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993) ("We have rejected the 'least-restrictive-means' test for judging restrictions on commercial speech . . . . "); *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993) (citing *Fox*, noting applicability of time, place and manner cases to "reasonable fit" prong of *Central Hudson* test).

Finally, Petitioners argue that the court of appeals erred by applying the *Central Hudson* test for commercial speech rather than some heightened standard of review. Pet. at 17. Petitioners' sole basis for this argument is that the Love Field Amendment implicates their constitutional right to travel. Because the Love Field Amendment does not implicate the right to travel, however, Petitioners'

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[8] In addition, the Love Field Amendment does not restrict people other than travel agents or airline employees from speaking freely about such information. Consumers may also learn about connecting flights from publicly available flight guides that list all arrivals and departures by airport.

argument fails by its own terms. *Kansas*, 16 F.3d at 442 n.6 (App. at 13a). *See also Cramer*, 931 F.2d at 1033 n.16.[9]

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[9] Likewise, Petitioners' reliance on *Carey v. Population Services International*, 431 U.S. 678 (1977) and *Bigelow v. Virginia*, 421 U.S. 809 (1975), to support their claim for "strict scrutiny" review is misplaced. This Court's decisions in *Carey* and *Bigelow* turned on a number of factors not present here. For example, the statutes in *Carey* and *Bigelow* restricted political as well as commercial speech. *See Carey*, 431 U.S. at 702 n.28 (The ban was "clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression - the core of First Amendment values."); *Bigelow*, 421 U.S. at 822 (The advertisement "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' "). Moreover, unlike the underlying activity in *Carey* and *Bigelow* (abortion services), the underlying activity here (interstate air travel from Love Field) can be banned altogether. As this Court stated in *Posadas*, "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite." *Posadas*, 478 U.S. at 345.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: August 26, 1994